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DE USUFRUCTU:

IUSTINIANI DIGESTORUM

LIB. VII TIT. I

EDITED

WITH A LEGAL AND PHILOLOGICAL
COMMENTARY

BY

HENRY JOHN ROBY

FORMERLY
CLASSICAL LECTURER IN ST JOHN'S COLLEGE, CAMBRIDGE
AND PROFESSOR OF JURISPRUDENCE IN UNIVERSITY COLLEGE, LONDON.

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PREFACE.

THIS book is the second part of the work published in 1884 and entitled 'An Introduction to the Study of Justinian's 'Digest, containing an account of its composition and of the 'jurists used or referred to therein, together with a full Com- 'mentary on one title (*de usufructu*)'.

In compliance with a wish expressed in several quarters, the two parts, viz. the Introduction properly so called, and the Commentary on the title *de usufructu*, are now issued separately. The work can however still be obtained in its complete form as originally published.

The following remarks are extracted from the original preface.

'It is not unusual for students who have read the Institutes 'of Gaius and Justinian to proceed to the Digest. But the 'Digest is not easy. Neither the arrangement nor the method 'nor in some respects the phraseology is the same as that of the 'Institutes, and whatever title is taken up seems to presume 'a knowledge of a good many other titles. Yet, so far as I 'am aware, there is no edition of any part of it, at least in 'modern times, which furnishes help of the same kind as that, 'which is expected and given in many editions of classical 'authors. The present book is an attempt in some degree to 'supply this want.

'One title fully explained seemed to me more likely to 'introduce a student to the intelligent study of the Digest than 'a longer portion less thoroughly treated. Accident determined

'the selection of the title *de usufructu,* but I have seen no 'reason for regretting the choice. There is much in the doctrine 'of usufruct which closely resembles our law of life interests, 'but there is also much which is specially Roman; and, as will 'be seen, a good many other parts of the law come naturally 'into notice in dealing with this. It is also not a little ad- 'vantage that the corresponding title of the *Basilica* is one 'of those which have been edited by Zachariä von Lingenthal, 'with the Byzantine comments conveniently arranged. The 'Vatican Fragments contain a number of extracts on Usufruct, 'which furnish important comparisons with the Digest.

'The text of the title *de usufructu* is that of Mommsen, 'with a few conjectural alterations. Whenever it deviates in 'any matter of moment from the Florentine text (i.e. represents 'neither that of the original copyist nor of the corrector) the 'fact is noted at the foot of the page. The arrangement of the 'text is my own.

'My notes it will be seen are legal, philological, and anti- 'quarian. They are of course much longer and more numerous 'than would properly accompany an edition of the Digest or of 'a large part of it. It seemed desirable to explain the meaning 'of a word or expression, not merely so far as the particular 'passage in question was concerned, but also as the student 'might find it in other parts of the Digest. A brief summary 'of the law on many matters has been given, partly to remind 'the student of its relation to the particular question in hand, 'and partly because what may be already familiar to him from 'the Institutes will be found to assume a somewhat different 'aspect under different treatment.

'Having had no predecessors in this particular field of an- 'notation I have no special obligations to acknowledge here. 'Throughout the book I have tried to take my information 'from the original sources, and to depend on others only when 'the matter in question was large in itself and not closely 'connected with my subject. Whenever I have made any dis- 'tinctive use of modern writers, or have thought the reader

'might like a fuller or different statement, I have given the 'requisite reference.

'But a vast general debt I am anxious to proclaim. No 'one who cares for Roman law and philology can fail to feel 'the heartiest gratitude to the noble school of workers and 'writers, of whom as jurists, historians and philologers the 'leaders and types in their respective generations and lines are 'Savigny and Mommsen'.

References to pages with roman numerals are to the first part: those to pages with arabic numerals are to this second part.

Attention is requested to the list of *Corrigenda*.

H. J. ROBY.

CORRIGENDA ET ADDENDA.

(This list contains several errors and omissions which were not noted at the time of the earlier issues.)

Page 20, add marginal note to l 48 '*Heir repairs without direction*'.

„ 30, line 19 from bottom, for '*Grom.* p. 56' read '*Grom.* p. 36'.

„ 40, line 8 from bottom, for 'Distinction' read 'Destruction'.

„ 45, line 6 from bottom, after 'practice' insert 'confirmed or suggested by a constitution of Seuerus (Cod. VIII. 56, l 2. § 2)'.

„ 84, line 9 from top, for 'sale' read 'hire'.

„ 87, last line, for '*Inst.*' read 'Cod. Iust.'

„ 103, lines 27 and 29 from top, for 'Negligence' read 'Mere omission'.

„ 144, line 19 from top, for '*traditis*' read '*tradidero*'.

„ 149, line 17 from top: Studemund in his second edition of Gaius (p. xxxi) states that the MS in III. 42 has *proinde*.

„ 151, line 2 from top, for 'Ulpian' read 'Paul'.

„ 194, line 7 from top, after 'free' insert 'by will'; and add at end of sentence: 'The case is otherwise, if he is set free by his master in his lifetime; (Vat. Fr. 261; D. XVI. 1. l 53)'.

„ 196, note on **inhabitare**. Add 'Justinian's constitution (Cod. III. 33, l 13) determines some of these questions differently from the Digest'.

„ 198, line 13 from top, for '50' read '60'.

„ 198, line 5 from bottom, at end of paragraph (*d*) add 'Justinian altered this, (*Inst.* II. 13. § 5)'.

„ 222, line 19 from top, for 'l 16' read 'l 3'.

„ 236, line 7 from top, for 'making' read 'marking'.

DIGESTORUM JUSTINIANI AUGUSTI

LIBRI SEPTIMI

TIT. I.

DE USU FRUCTU ET QUEMADMODUM QUIS UTATUR FRUATUR.

Character and Creation of Usufruct.

Usufruct defined. Usus fructus est ius alienis rebus utendi fruendi salua rerum substantia. Est enim usus fructus ius in corpore quo sublato et ipsum tolli necesse est. 1. Paul. ad Uitell. III. 2. Celsus Dig. XVIII.

Consists in what? Omnium praediorum iure legati potest constitui usus fructus, ut heres iubeatur dare alicui usum fructum: dare autem intellegitur, si induxerit in fundum legatarium, eumue patiatur uti frui. Et sine testamento autem si quis uelit usum fructum constituere, pactionibus et stipulationibus id efficere potest. Consistit[1] autem usus fructus non tantum in fundo et aedibus, uerum etiam in seruis et iumentis ceterisque rebus. Ne tamen in uniuersum inutiles essent proprietates semper abscedente usu fructu, placuit certis modis extingui usum fructum et ad proprietatem reuerti. Quibus autem modis usus fructus et constituitur[2] et finitur, isdem modis etiam nudus usus solet et constitui et finiri. 3. Gaius Rer. Cott. II. 1 2 3

How extinguished.

May be part of ownership; Usus fructus in multis casibus pars dominii est, et exstat, quod uel praesens uel ex die dari potest. 4. Paulus ad edict. II.

[1] *Ita aliquot dett.;* constitit *F.* [2] *Ita dett.;* constitit *F.*

and may be divided. Usus fructus et ab initio pro parte indiuisa uel diuisa constitui et legitimo tempore similiter amitti eademque ratione per legem Falcidiam minui potest: reo quoque promittendi defuncto in partes hereditarias usus fructus obligatio diuiditur: et si ex communi praedio debeatur, uno ex sociis defendente pro parte defendentis fiet restitutio. 5. PAPINIANUS Quaest. VII.

How created. Usus fructus pluribus modis constituitur: ut ecce, si legatus fuerit. Sed et proprietas deducto usu fructu legari potest, ut apud heredem maneat usus fructus. Constituitur adhuc usus fructus et in iudicio familiae erciscundae et communi diuidundo, si iudex alii proprietatem adiudicauerit, alii usum fructum. 6. GAIUS ad edict. prou. VII. 1

Adquiritur autem nobis usus fructus non solum per nosmet ipsos, sed etiam per eas quoque personas, quas iuri nostro subiectas habemus. Nihil autem uetat seruo meo herede instituto legari proprietatem deducto usu fructu. 2 3

Rights and Duties of Fructuary.

Rights of fructuary in buildings. Usu fructu legato omnis fructus rei ad fructuarium pertinet. Et aut rei soli aut rei mobilis usus fructus legatur. Rei soli, ut puta aedium, usu fructu legato, quicumque reditus est, ad usufructuarium pertinet, quaeque obuentiones sunt ex aedificiis, ex areis, et ceteris quaecumque aedium sunt. Unde etiam mitti eum in possessionem uicinarum aedium causa damni infecti placuit, et iure dominii possessurum eas aedes, si perseueretur non caueri, nec quicquam amittere finito usu fructu. Hac ratione Labeo scribit nec aedificium licere domino te inuito altius tollere, sicut nec areae usu fructu legato potest in area aedificium poni: quam sententiam puto ueram. 7. ULPIANUS ad Sab. XVII. 1

Duty to repair. Quoniam igitur omnis fructus rei ad eum pertinet, reficere quoque eum aedes per arbitrum cogi Celsus scribit[1] libro octauo decimo digestorum, hacte- 2

[1] scribit Celsus libro *F*.

nus tamen, ut sarta tecta habeat: si qua tamen uetustate corruissent, neutrum cogi reficere, sed si heres refecerit, passurum fructuarium uti. Unde Celsus de modo sarta tecta habendi quaerit, si, quae uetustate corruerunt, reficere non cogitur. Modica igitur refectio ad eum pertinet, quoniam et alia onera adgnoscit usu fructu legato: ut puta stipendium uel tributum uel solarium[1] uel alimenta ab ea re relicta: et ita Marcellus libro tertio decimo scribit. Cassius quoque 3
scribit libro octauo iuris ciuilis fructuarium per arbitrum cogi reficere, quemadmodum adserere cogitur
Right to repair. arbores: et Aristo notat haec uera esse. Neratius autem libro quarto membranarum ait non posse fructuarium prohiberi, quo minus reficiat, quia nec arare prohiberi potest aut colere: nec solum necessarias refectiones facturum, sed etiam uoluptatis causa (ut tectoria et pauimenta et similia) facere, neque autem ampliare nec utile detrahere posse, ‖ quamuis melius 8. Idem ad edict. xl.
repositurus sit: quae sententia uera est.

Rights of fructuary in landed estate Item si fundi usus fructus sit legatus, quidquid 9. Idem ad Sab. xvii.
in fundo nascitur, quidquid inde percipi potest, ipsius fructus est, sic tamen ut boni uiri arbitratu fruatur: nam et Celsus libro octauo decimo digestorum scribit
as regards bees, cogi eum posse recte colere. Et si apes in eo fundo 1
sint, earum quoque usus fructus ad eum pertinet.
minerals, Sed si lapidicinas habeat et lapidem caedere uelit 2
uel cretifodinas habeat uel harenas, omnibus his usurum Sabinus ait quasi bonum patrem familias: quam sententiam puto ueram. Sed si haec metalla post 3
usum fructum legatum sint inuenta, cum totius agri relinquatur usus fructus, non partium, continentur
accessions, legato. Huic uicinus tractatus est, qui solet in eo 4
quod accessit tractari: et placuit alluuionis quoque usum fructum ad fructuarium pertinere. Sed si insula iuxta fundum in flumine nata sit, eius usum fructum ad fructuarium non pertinere Pegasus scribit, licet

[1] salarium *Codd.*

proprietati accedat: esse enim ueluti proprium fundum, cuius usus[1] fructus ad te non pertineat. Quae sententia non est sine ratione: nam, ubi latet[2] incrementum, et usus fructus augetur, ubi autem appa-
game, ret separatum, fructuario non accedit. Aucupiorum 5
quoque et uenationum reditum Cassius ait libro octauo iuris ciuilis ad fructuarium pertinere: ergo
nursery ground, et piscationum. Seminarii autem fructum puto ad 6
fructuarium pertinere ita[3], ut et uendere ei et seminare liceat: debet tamen conserendi agri causa seminarium paratum semper renouare quasi instrumentum
farm plant, agri, ut finito usu fructu domino restituatur. In- 7
strumenti autem fructum habere debet: uendendi
under-wood, tamen facultatem non habet. Nam et si fundi usus fructus fuerit legatus, et sit ager, unde palo in fundum, cuius usus fructus legatus est, solebat pater familias uti, uel salice uel harundine, puto fructuarium hactenus uti posse, ne ex eo uendat, nisi forte salicti ei uel siluae palaris uel harundineti usus fructus sit legatus: tunc enim et uendere potest. Nam et Trebatius scribit siluam caeduam et harundinetum posse fructuarium caedere, sicut pater familias caedebat, et uendere, licet pater familias non solebat uendere sed ipse uti: ad modum enim referendum est, non ad qualitatem utendi.
Ex silua caedua pedamenta et ramos ex arbore usu- **10.** Pomponius ad Sab. v.
fructuarium sumpturum: ex non caedua in uineam sumpturum, dum ne fundum deteriorem faciat.
timber. || Sed si grandes arbores essent, non posse eas cae- **11.** Paul. epit. Alfeni Digest. ii.
dere. || Arboribus euolsis uel ui uentorum deiectis **12.** Ulpianus ad Sab. xvii.
usque ad usum suum et uillae posse usufructuarium ferre Labeo ait: nec materia eum pro ligno usurum, si habeat unde utatur ligno: quam sententiam puto ueram: alioquin et si totus ager sit hunc casum passus, omnes arbores auferret fructuarius: materiam tamen ipsum succidere, quantum ad uillae refectionem, putat posse:

[1] usu *F.* [2] latet *ex mea coni.*; latitet *Codd.*
[3] ita tamen ut *Codd.*

quemadmodum calcem, inquit, coquere uel harenam fodere aliudue quid aedificio necessarium sumere.

Usufruct in ship.

Nauis usu fructu legato ad[1] nauigandum mitten- 1
dam puto, licet naufragii periculum immineat: nauis etenim ad hoc paratur, ut nauiget.

What is Exercise of Usufruct?

What is exercise of usufruct?

Usufructuarius uel ipse frui ea re uel alii fruen- 2
dam concedere uel locare uel uendere potest: nam et qui locat utitur, et qui uendit utitur. Sed et si alii precario concedat uel donet, puto eum uti atque ideo retinere usum fructum, et hoc Cassius et Pegasus responderunt et Pomponius libro quinto ex Sabino probat. Non solum autem si ego locauero, retineo usum fructum, sed[2] et si alius negotium meum gerens locauerit usum fructum, Iulianus libro trigensimo quinto scripsit retinere me usum fructum. Quid tamen si non locauero, sed absente et ignorante me negotium meum gerens utatur quis et fruatur? nihilo minus retineo usum fructum (quod et Pomponius libro quinto probat) per hoc, quod negotiorum gestorum actionem adquisiui.

Usufruct of fugitive slave.

De illo Pomponius dubitat, si fugitiuus, in quo 3
meus usus fructus est, stipuletur aliquid ex re mea uel per traditionem accipiat, an per hoc ipsum, quasi utar, retineam usum fructum? magisque admittit retinere. Nam saepe etiamsi praesentibus seruis non utamur, tamen usum fructum retinemus: ut puta aegrotante[3] seruo uel infante, cuius operae nullae sunt, uel defectae senectutis homine: nam et si agrum aremus, licet tam sterilis sit, ut nullus fructus nascatur, retinemus usum fructum. Iulianus tamen libro trigensimo quinto digestorum scribit, etiamsi non stipuletur quid seruus fugitiuus, retineri tamen usum fructum: nam qua ratione, inquit, retinetur a proprietario possessio,

[1] *Codd. omittunt* ad. [2] sed *Momms. cum Graecis;* seu *F.*
[3] aegrotanti seruo uel infanti *F*; aegrotante seruo infante *Uat.*

etiamsi in fuga seruus sit, pari ratione etiam usus fructus retinetur. Idem tractat: quid, si quis pos- 4
sessionem eius nactus sit? an, quemadmodum a proprietario possideri desinit, ita etiam usus fructus amittatur? et primo quidem ait posse dici amitti usum fructum, sed licet amittatur, tamen dicendum, quod intra constitutum tempus ex re fructuarii stipulatus est, fructuario adquiri[1]: per quod colligi posse dici, ne quidem si possideatur ab alio, amitti usum fructum, si modo mihi aliquid stipuletur, paruique referre, ab herede possideatur uel ab alio, cui hereditas uendita sit uel cui proprietas legata sit, an a praedone: sufficere enim ad retinendum usum fructum esse affectum retinere uolentis et seruum nomine fructuarii aliquid facere: quae sententia habet rationem.

Ripe produce before gathering.

Iulianus libro trigensimo quinto digestorum trac- 5
tat, si fur decerpserit uel desecuerit fructus maturos pendentes, cui condictione teneatur, domino fundi an fructuario? et putat, quoniam fructus non fiunt fructuarii, nisi ab eo percipiantur, licet ab alio terra separentur, magis proprietario condictionem competere, fructuario autem furti actionem, quoniam interfuit eius fructus non esse ablatos. Marcellus autem mouetur eo, quod, si postea fructus istos nactus fuerit fructuarius, fortassis fiant eius: nam si fiunt, qua ratione hoc euenit? nisi ea, ut interim fierent proprietarii, mox adprehensi fructuarii efficiantur[2], exemplo rei sub condicione legatae, quae interim heredis est, existente autem condicione ad legatarium transit; uerum est enim condictionem competere proprietario. Cum autem in pendenti est dominium, ut ipse Iulianus ait in[3] fetu qui summittitur et in eo quod seruus fructuarius per traditionem accepit nondum quidem pretio soluto, sed tamen ab eo satisfacto, dicendum est condictionem pendere[4].

[1] adquiri potest *Codd.* [2] efficientur *F.*
[3] inque fetu *F, ex incerta manu.*
[4] *Addunt Codd.* magisque in pendenti esse dominium.

What is due Exercise of Usufruct?

Fructuary must give security.

Si cuius rei usus fructus legatus erit, dominus potest in ea re satisdationem desiderare, ut officio iudicis hoc fiat: nam sicuti debet fructuarius uti frui, ita et proprietatis dominus securus esse debet de proprietate. Haec autem ad omnem usum fructum pertinere Iulianus libro trigensimo octauo digestorum probat: si usus fructus legatus sit, non prius dandam actionem usufructuario, quam satisdederit se boni uiri arbitratu usurum fruiturum. Sed et si plures sint, a quibus usus fructus relictus est, singulis satisdari oportet. Cum igitur de usu fructu agitur, non solum quod factum est arbitratur, sed etiam in futurum quemadmodum uti frui debet. De praeteritis autem damnis fructuarius etiam lege Aquilia tenetur et interdicto 'quod ui aut clam,' ut Iulianus ait: nam fructuarium quoque teneri his actionibus nec non furti certum est, sicut quemlibet alium, qui in aliena re tale quid commiserit. Denique consultus, quo bonum fuit actionem polliceri praetorem, cum competat legis Aquiliae actio, respondit, quia sunt casus, quibus cessat Aquiliae actio, ideo iudicem dari, ut eius arbitratu utatur: nam qui agrum non proscindit, qui uites non subserit, item aquarum ductus corrumpi patitur, lege Aquilia non tenetur. Eadem et in usuario dicenda sunt. Sed si inter duos fructuarios sit controuersia, Iulianus libro trigensimo octauo digestorum scribit aequissimum esse quasi communi diuidundo iudicium dari uel stipulatione inter se eos cauere, qualiter fruantur: cur enim, inquit Iulianus, ad arma et rixam procedere patiatur praetor, quos potest iurisdictione sua componere? quam sententiam Celsus quoque libro uicensimo digestorum probat, et ego puto ueram. 18. Idem ad Sab. xviii. 1 2 3

Liabilities of fructuary

in case of neglect.

Dispute between fructuaries.

Restrictions on fructuary in landed estates,

Fructuarius causam proprietatis deteriorem facere non debet, meliorem facere potest. Et aut fundi est usus fructus legatus, et non debet neque arbores frugiferas excidere neque uillam diruere nec quicquam facere 4

in perniciem proprietatis: et si forte uoluptarium fuit praedium, uirdiaria uel gestationes uel deambulationes arboribus infructuosis opacas atque amoenas habens, non debebit deicere, ut forte hortos olitorios faciat uel aliud quid, quod ad reditum spectat. Inde est quae- 5
situm, an lapidicinas uel cretifodinas uel harenifodinas ipse instituere possit: et ego puto etiam ipsum instituere posse, si non agri partem necessariam huic rei occupaturus est. Proinde uenas quoque lapidicinarum et huiusmodi metallorum inquirere poterit: ergo et auri et argenti et sulpuris et aeris et ferri et ceterorum fodinas uel quas pater familias instituit exercere poterit uel ipse instituere, si nihil agriculturae nocebit: et si forte in hoc quod instituit plus reditus sit quam in uineis uel arbustis uel oliuetis quae fuerunt, forsitan etiam haec deicere poterit, si quidem ei permittitur meliorare proprietatem. Si tamen quae instituit usufructuarius 6
aut caelum corrumpant agri aut magnum apparatum sint desideratura opificum forte uel legulorum, quae non potest sustinere proprietarius, non uidebitur uiri boni arbitratu frui: sed nec aedificium quidem positurum in fundo, nisi quod ad fructum percipiendum necessarium
in buildings, sit. Sed si aedium usus fructus legatus sit, Nerua 7
filius et lumina immittere eum posse ait: sed et colores et picturas et marmora poterit et sigilla et si quid ad domus ornatum: sed neque diaetas transformare uel coniungere aut separare ei permittetur, uel aditus posticasue uertere, uel refugia aperire, uel atrium mutare, uel uirdiaria ad alium modum conuertere: excolere enim quod inuenit potest qualitate aedium non immutata. Item Nerua eum cui aedium usus fructus legatus sit altius tollere non posse, quamuis lumina non obscurentur, quia tectum magis turbatur: quod Labeo etiam in proprietatis domino scribit. Idem Nerua nec obstruere eum
in dwelling house, posse. Item si domus usus fructus legatus sit, 8
meritoria illic facere fructuarius non debet nec per cenacula diuidere domum: atquin locare potest, sed oportebit quasi domum locare. Nec balineum ibi

faciendum est. Quod autem dicit meritoria non facturum, ita accipe, quae uolgo deuersoria uel fullonica appellant. Ego quidem, et si balineum sit in domo usibus dominicis solitum uacare in intima parte domus uel inter diaetas amoenas, non recte nec ex boni uiri arbitratu facturum, si id locare coeperit, ut publice lauet, non magis quam si domum ad stationem iumentorum locauerit, aut si, stabulum quod erat domus iumentis et carruchis uacans, pistrino locauerit, || licet multo minus ex ea re fructuum[1] percipiat. || Sed si quid inaedificauerit, postea eum neque tollere hoc neque refigere posse: refixa plane posse uindicare. 14. PAUL. ad Sab. III. 15. ULPIANUS ad Sab. XVIII.

in slaves, Mancipiorum quoque usu fructu[2] legato non debet abuti, sed secundum condicionem eorum uti: nam si librarium rus mittat et qualum et calcem portare cogat, histrionem balneatorem[3] faciat, uel de symphonia atriensem, uel de palaestra stercorandis latrinis praeponat, abuti uidebitur proprietate. Sufficienter autem alere et uestire debet secundum ordinem et dignitatem mancipiorum. Et generaliter Labeo ait in omnibus rebus mobilibus modum eum tenere debere, ne sua feritate uel saeuitia ea corrumpat: alioquin etiam lege Aquilia eum conueniri. 1

in dress. Et, si uestimentorum usus fructus legatus sit, non sic ut quantitatis usus fructus legetur, dicendum est ita uti eum debere, ne abutatur: nec tamen locaturum, quia uir bonus ita non uteretur. Proinde et si scaenicae uestis usus fructus legetur uel aulaei uel alterius apparatus, alibi quam in scaena non utetur. Sed an et locare possit, uidendum est: et puto locaturum, et licet testator commodare, non locare, fuerit solitus, tamen ipsum fructuarium locaturum tam scaenicam quam funebrem uestem[4]. 2 3 4 5

Restrictions on owner: as regards plant, Proprietatis dominus non debebit impedire fructuarium ita utentem, ne deteriorem eius condicionem faciat. De quibusdam plane dubitatur, si eum uti 6

[1] *Ita Hal.;* fructum *Codd.* [2] *Ita dett. Codd.;* usus fructus *F.*
[3] balniatorem *Codd. Momms.*
[4] *Post* uestem *ins. F ex incerta manu* si lanae alicui.

prohibeat, an iure id faciat: ut puta doleis, si forte fundi usus fructus sit legatus, et putant quidam, etsi defossa sint, uti prohibendum: idem et in seriis et in cuppis et in cadis et amphoris putant: idem et in specularibus, si domus usus fructus legetur: sed ego puto, nisi sit contraria uoluntas, etiam instrumentum fundi uel domus contineri. *imposition of new servitudes,* Sed nec seruitutem imponere fundo 7 potest proprietarius nec amittere seruitutem: adquirere plane seruitutem eum posse etiam inuito fructuario Iulianus scripsit. Quibus consequenter fructuarius quidem adquirere fundo seruitutem non potest, retinere autem potest: et si forte fuerint non utente fructuario amissae, hoc quoque nomine tenebitur. Proprietatis dominus ne quidem consentiente fructuario seruitutem imponere potest, || nisi per[1] quam deterior fructuarii condicio non fiat, ueluti si talem seruitutem uicino concesserit ius sibi non esse altius tollere. **16.** PAULUS ad Sab. III. *devotion of land to religion,* Locum **17.** ULPIANUS ad Sab. XVIII. autem religiosum facere potest consentiente usufructuario: et hoc uerum est fauore religionis. Sed interdum et solus proprietatis dominus locum religiosum facere potest: finge enim eum testatorem inferre, cum non esset tam oportune ubi sepeliretur. *powers over slaves.* Ex eo, ne 1 deteriorem condicionem fructuarii faciat proprietarius, solet quaeri, an seruum dominus coercere possit: et Aristo apud Cassium notat plenissimam eum coercitionem habere, si modo sine dolo malo faciat: quamuis usufructuarius nec contrariis quidem ministeriis aut inusitatis artificium eius corrumpere possit nec seruum cicatricibus deformare. Proprietarius autem et seruum 2 noxae dedere poterit, si hoc sine dolo malo faciat, quoniam noxae deditio iure non peremit usum fructum, non magis quam usucapio proprietatis, quae post constitutum usum fructum contingit. Debebit plane denegari usus fructus persecutio, si ei qui noxae accepit litis aestimatio non offeratur a fructuario. Si quis 3 seruum occiderit, utilem actionem exemplo Aquiliae fructuario dandam numquam dubitaui.

[1] per *om. F; ins. alii Codd. et edd.*

Miscellaneous Extracts.

Trees decayed. Agri usu fructu legato in locum demortuarum arborum aliae substituendae sunt, et priores ad fructuarium pertinent. **18.** PAULUS ad Sab. III.

Imposition of servitudes. Proculus putat insulam[1] posse ita legari, ut ei seruitus imponatur quae alteri insulae hereditariae debeatur, hoc modo: 'Si ille heredi meo promiserit per 'se non fore, quo altius ea aedificia tollantur, tum ei 'eorum aedificiorum usum fructum do lego;' uel sic: 'Aedium illarum, quoad altius, quam uti nunc sunt, 'aedificatae non erunt, illi usum fructum do lego.' **19.** POMPONIUS ad Sab. V.

Trees blown down. Si arbores uento deiectas dominus non tollat, per quod incommodior sit[2] usus fructus uel iter, suis actionibus usufructuario cum eo experiundum. 1

Yearly fruits. Si quis ita legauerit: 'fructus annuos fundi Corneliani Gaio Maeuio do lego,' perinde accipi debet hic sermo ac si usus fructus fundi esset legatus. **20.** ULPIANUS ad Sab. XVIII.

Gains of Owner and Fructuary through Slaves.

Gains through slaves. Si serui usus fructus sit legatus, quidquid is ex opera sua adquirit uel ex re fructuarii, ad eum pertinet, siue stipuletur siue ei possessio fuerit tradita. Si uero heres institutus sit uel legatum acceperit, Labeo distinguit, cuius gratia uel heres instituitur uel legatum acceperit. Sed et si quid donetur seruo, in quo usus fructus alterius est, quaeritur, quid fieri oporteat. Et in omnibus istis, si quidem contemplatione fructuarii aliquid ei relictum uel donatum est, ipsi adquiret: sin uero proprietarii, proprietario: si ipsius serui, adquiretur domino, nec distinguimus, unde cognitum eum et cuius merito habuit qui donauit uel reliquit. Sed et si condicionis implendae causa quid seruus fructuarius consequatur et constiterit[3] contemplatione fructuarii **21.** IDEM ad Sab. XVII. **22.** IDEM ad Sab. XVIII.

[1] *Fortasse* insulae usum fructum. *Uide adnotationem.*
[2] incommodior is sit *F, Mommsen; om.* is *Codd. dett.*
[3] et *addit F' ex incerta manu.*

eam condicionem adscriptam, dicendum est ipsi adquiri: nam et in mortis causa donatione idem dicendum est.

Sed sicuti stipulando fructuario adquirit, ita etiam paciscendo eum adquirere exceptionem fructuario Iulianus libro trigensimo digestorum scribit. Idemque et si acceptum rogauerit, liberationem ei parere. **23.** IDEM eod. XVII.

Power of fructuary over slave.

Quoniam autem diximus quod ex operis adquiritur ad fructuarium pertinere, sciendum est etiam cogendum eum operari: etenim modicam quoque castigationem fructuario competere Sabinus respondit et Cassius libro octauo iuris ciuilis scripsit, ut[1] neque torqueat, neque flagellis caedat. 1

Gift to fructuary through slave.

Si quis donaturus usufructuario spoponderit seruo in quem usum fructum habet stipulanti, ipsi usufructuario obligabitur, quia ut ei seruus talis stipulari possit, usitatum est. Sed et si quid stipuletur sibi aut Sticho seruo fructuario donandi causa, dum uult fructuario praestitum, dicendum, si ei soluatur, fructuario adquiri. **24.** PAULUS ad Sab. X. **25.** ULPIANUS ad Sab. XVIII.

Doubtful for whom slave acquires.

Interdum tamen in pendenti est, cui adquirat iste fructuarius seruus: ut puta si seruum emit et per traditionem accepit necdum pretium numerauit, sed tantummodo pro eo fecit satis, interim cuius sit, quaeritur: et Iulianus libro trigensimo quinto digestorum scripsit in pendenti esse dominium eius et numerationem pretii declaraturam, cuius sit: nam si ex re fructuarii, retro fructuarii fuisse. Idemque est et si forte stipulatus sit seruus numeraturus pecuniam: nam numeratio declarabit, cui sit adquisita stipulatio. Ergo ostendimus in pendenti esse dominium, donec pretium numeretur: quid ergo, si amisso usu fructu tunc pretium numeretur? Iulianus quidem libro trigensimo quinto digestorum scripsit adhuc interesse, unde sit pretium numeratum: Marcellus uero et Mauricianus amisso usu fructu iam putant dominium adquisitum proprietatis domino: sed Iuliani sententia humanior 1

[1] *Ita Mommsen cum Codd.;* et *Uat.;* ui *F.*

est. Quod si ex re utriusque pretium fuerit solutum, ad utrumque dominium pertinere Iulianus scripsit, scilicet pro rata pretii soluti. Quid tamen si forte simul soluerit ex re utriusque, ut puta decem milia pretii nomine debebat et dena soluit ex re singulorum: cui magis seruus adquirat? Si numeratione soluat, intererit, cuius priores nummos soluat: nam quos postea soluerit, aut uindicabit aut, si fuerint nummi consumpti, ad condictionem pertinent: si uero simul in sacculo soluit, nihil fecit accipientis, et ideo nondum adquisisse cuiquam dominium uidetur, quia cum plus pretium soluit seruus, non faciet nummos accipientis.

Apportionment of slave's hire.

Si operas suas iste seruus locauerit et 2 in annos singulos certum aliquid stipuletur, eorum quidem annorum stipulatio, quibus usus fructus mansit, adquiretur fructuario, sequentium uero stipulatio ad proprietarium transit semel adquisita fructuario, quamuis non soleat stipulatio semel cui quaesita ad alium transire nisi ad heredem uel adrogatorem. Proinde si forte usus fructus in annos singulos fuerit legatus et iste seruus operas suas locauit et stipulatus est ut supra scriptum est, prout capitis minutione amissus fuerit usus fructus, mox restitutus, ambulabit stipulatio profectaque ad heredem redibit ad fructuarium.

Owner has residuary rights.

Quaes- 3 tionis est, an id quod adquiri fructuario non potest proprietario adquiratur. Et Iulianus quidem libro trigensimo quinto digestorum scripsit, quod fructuario adquiri non potest, proprietario quaeri. Denique scribit eum, qui ex re fructuarii stipuletur nominatim proprietario uel iussu eius, ipsi adquirere. Contra autem nihil agit, si non ex re fructuarii nec ex operis suis fructuario stipuletur.

Seruus fructuarius si usum fructum in 4 se dari stipuletur aut sine nomine aut nominatim proprietario, ipsi adquirit exemplo serui communis, qui stipulando rem alteri ex dominis cuius res est, nihil agit, quoniam rem suam stipulando quis nihil agit, alteri stipulando adquirit solidum.

Slave cannot hire his own services.

Idem Iulianus 5 eodem libro scripsit: si seruo fructuarius operas eius

locauerit, nihil agit: nam et si ex re mea, inquit, a me stipulatus sit, nihil agit, non magis quam seruus alienus bona fide mihi seruiens idem agendo domino quicquam adquirit. Simili modo, ait, ne quidem si rem meam a me fructuario conducat, me non obligabit. Et regulariter definiit: quod quis ab alio stipulando mihi adquirit, id a me stipulando nihil agit: nisi forte, inquit, nominatim domino suo stipuletur a me uel conducat.

Case of two fructuaries.

6 Si duos fructuarios proponas et ex alterius re seruus sit stipulatus, quaeritur, utrum totum an pro parte, qua habet usum fructum, ei quaeratur. Nam et in duobus bonae fidei possessoribus hoc idem est apud Scaeuolam agitatum libro secundo quaestionum, et ait uolgo creditum rationemque hoc facere, ut, si ex re alterius stipuletur, partem ei dumtaxat quaeri, partem domino: quod si nominatim sit stipulatus, nec dubitari debere, quin adiecto nomine solidum ei quaeratur. Idemque ait et si iussu eius stipuletur, quoniam iussum pro nomine accipimus. Idem et in fructuariis erit dicendum, ut, quo casu non totum adquiretur fructuario, proprietatis domino erit quaesitum, quoniam ex re fructuarii quaeri ei posse ostendimus.

Rules apply to all fructuaries.

7 Quod autem diximus ex re fructuarii uel ex operis posse adquirere, utrum tunc locum habeat, quotiens iure legati usus fructus sit constitutus, an et si per traditionem uel stipulationem uel alium quemcumque modum, uidendum. Et uera est Pegasi sententia, quam et Iulianus libro sexto decimo secutus est, omni[1] fructuario adquiri.

Remainder of hire vests in owner.

26. Paulus ad Sab. III. Si operas suas locauerit seruus fructuarius et inperfecto tempore locationis usus fructus interierit, quod superest ad proprietarium pertinebit. Sed et si ab initio certam summam propter operas certas stipulatus fuerit, capite deminuto eo idem dicendum est.

[1] *Ita Mommsen ex coni. Cuiacii. Codd.* omnia.

Rights and Liabilities of Fructuary further considered.

Fructuary's right to hanging produce, *to let shops,* *to train slaves.* *Fructuary's liability to pay taxes, &c.* *to submit to existing servitudes* *and restrictions.*

27. ULPIANUS ad Sab. XVIII. Si pendentes fructus iam maturos reliquisset testator, fructuarius eos feret, si die legati cedente adhuc pendentes deprehendisset: nam et stantes fructus ad fructuarium pertinent. Si dominus 1 solitus fuit tabernis ad merces suas uti uel ad negotiationem, utique permittetur fructuario locare eas et ad alias merces, et illud solum obseruandum, ne uel abutatur usufructuarius uel contumeliose iniurioseue utatur usu fructu. Si serui usus fructus legatus est, cuius 2 testator quasi ministerio uacuo utebatur, si eum disciplinis uel arte instituerit usufructuarius, arte eius uel peritia utetur.

Si quid cloacarii nomine debeatur uel si quid ob 3 formam aquae ductus, quae per agrum transit, pendatur, ad onus fructuarii pertinebit: sed et si quid ad collationem uiae, puto hoc quoque fructuarium subiturum: ergo et quod ob transitum exercitus confertur ex fructibus: sed et si quid municipio: nam solent possessores certam partem fructuum municipio uiliori pretio addicere; solent et fisco fusiones praestare. Haec onera ad fructuarium pertinebunt. Si qua seruitus 4 imposita est fundo, necesse habebit fructuarius sustinere: unde et si per stipulationem seruitus debeatur, idem puto dicendum. Sed et si seruus sub poena 5 emptus sit interdictis certis quibusdam, an, si usus fructus eius fuerit legatus, obseruare haec fructuarius debeat? et puto debere eum obseruare: alioquin non boni uiri arbitratu utitur et fruitur.

Miscellaneous Extracts.

Usufruct in coins, *in whole estate.*

28. POMPONIUS ad Sab. V. Nomismatum aureorum uel argenteorum ueterum, quibus pro gemmis uti solent, usus fructus legari potest.

29. ULPIANUS ad Sab. XV. Omnium bonorum usum[1] fructum posse legari, nisi excedat dodrantis aestimationem, Celsus libro tri-

[1] usu *F.*

gensimo secundo digestorum et Iulianus libro sexagensimo primo scribit: et est uerius.

Powers of owner.

Si is qui binas aedes habeat aliarum usum fructum legauerit, posse heredem Marcellus scribit alteras altius tollendo officere[1] luminibus, quoniam habitari potest etiam obscuratis aedibus. Quod usque adeo temperandum est, ut non in totum aedes obscurentur, sed modicum lumen, quod habitantibus sufficit, habeant. **30.** Paulus ad Sab. III.

What is ex re fructuarii?

Ex re fructuarii etiam id intellegitur, quod ei fructuarius donauerit concesseritue uel ex administratione rerum eius compendii seruus fecerit. **31.** Idem ad Sab. X.

Reservation by owner.

Si quis unas aedes, quas solas habet, uel fundum tradit, excipere potest id quod personae, non praedii, est, ueluti usum et usum fructum: sed et si excipiat, ut pascere sibi uel inhabitare liceat, ualet exceptio, cum ex multis saltibus pastione fructus perciperetur; et habitationis exceptione, siue temporali siue usque ad mortem eius qui excepit, usus uidetur exceptus. **32.** Pomponius ad Sab. XXXIII.

Usufruct follows ownership,

Si Titio fructus, Maeuio proprietas legata sit et uiuo testatore Titius decedat, nihil apud scriptum heredem relinquetur: et id Neratius quoque respondit. **33.** Papinianus Quaest. XVII.

but is not a part.

Usum fructum in quibusdam casibus non partis effectum optinere conuenit: unde si fundi uel fructus portio petatur et absolutione secuta postea pars altera quae adcreuit uindicetur, in lite quidem proprietatis iudicatae rei exceptionem obstare, in fructus uero non obstare scribit Iulianus, quoniam portio fundi uelut alluuio portioni, personae fructus adcresceret. 1

Joint and separate usufruct.

Quotiens duobus usus fructus legatur ita, ut alternis annis utantur fruantur, si quidem ita legatus fuerit 'Titio et Maeuio,' potest dici priori Titio, deinde Maeuio legatum datum. Si uero duo eiusdem nominis fuerint et ita scriptum fuerit 'Titiis usum fructum alternis annis do:' nisi consenserint, uter eorum prior utatur, inuicem sibi impedimento erunt[2]. Quod si Titius eo anno, quo frueretur, proprietatem accepisset, interim **34.** Iulianus Dig. XXXV.

[1] *Ita ex mea coni.;* obscurare *Codd.*

[2] *Ita ex mea coni.;* sibi impedient *Codd.*

legatum non habebit, sed ad Maeuium alternis annis usus fructus pertinebit: et, si Titius proprietatem alienasset, habebit eum usum fructum; quia et si sub condicione usus fructus mihi legatus fuerit et interim proprietatem ab herede accepero, pendente autem condicione eandem alienauero, ad legatum admittar.

Usufruct bequeathed to tenant.

Si colono tuo usum fructum fundi legaueris, usum fructum uindicabit et cum herede tuo aget ex conducto et consequetur, ut neque mercedes praestet et impensas, quas in culturam fecerat, recipiat[1]. 1

Usufruct lost by change of object.

Uniuersorum bonorum an singularum rerum usus fructus legetur, hactenus interesse puto, quod, si aedes incensae fuerint, usus fructus specialiter aedium legatus peti non potest, bonorum autem usu fructu legato areae usus fructus peti poterit: quoniam qui bonorum suorum usum fructum legat, non solum eorum quae in specie sunt, sed et substantiae omnis, usum fructum legare uidetur: in substantia autem bonorum etiam area est. 2

Heir's delay.

Si usus fructus legatus est, sed heres scriptus ob hoc tardius adit, ut tardius ad legatum peruenireturhoc quoque praestabitur, ut Sabino placuit. **35.** IDEM ad Ursceium Feroc. I.

Slave's freedom and sale of usufruct.

Usus fructus serui mihi legatus est, isque, cum ego uti frui desissem, liber esse iussus est: deinde ego ab herede aestimationem legati tuli: nihilo magis eum liberum fore Sabinus respondit, (namque uideri me uti frui homine, pro quo aliquam rem habeam), condicionem autem eius libertatis eandem manere, ita ut mortis meae aut capitis deminutionis interuentu liber futurus esset. 1

Change of object.

Qui usum fructum areae legauerat, insulam ibi aedificauit: ea uiuo eo decidit uel deusta est: usum fructum deberi existimauit: contra autem non idem iuris esse, si insulae usu fructu legato area, deinde insula, facta sit: idemque esse, et si scyphorum usus fructus legatus sit, deinde massa facta et iterum scyphi: licet enim pristina qualitas scyphorum restituta sit, non tamen illos esse, quorum usus fructus legatus sit. **36.** AFRICANUS Quaest. V.

[1] *Post* recipiat *addit F ex incerta manu* constitutum.

Reservation of usufruct enures to whom?

Stipulatus sum de Titio fundum Cornelianum detracto usu fructu: Titius decessit: quaesitum est, quid mihi heredem eius praestare oportet. Respondit referre, qua mente usus fructus exceptus sit: nam si quidem hoc actum est, ut in cuiuslibet persona usus fructus[1] constitueretur, solam proprietatem heredem debiturum: sin autem id actum sit, ut promissori dumtaxat usus fructus reciperetur, plenam proprietatem heredem eius debiturum. Hoc ita se habere manifestius in causa legatorum apparere: etenim si heres, a quo detracto usu fructu proprietas legata sit, priusquam ex testamento ageretur, decesserit, minus dubitandum, quin heres eius plenam proprietatem sit debiturus: idemque et si sub condicione similiter legatum[2] sit et pendente condicione heres decessit. 1

Heir's delay.

Usus fructus serui Titio legatus est: cum per heredem staret, quo minus praestaretur, seruus mortuus est: aliud dici non posse ait, quam in id obligatum esse heredem, quanti legatarii intersit moram factam non esse, ut scilicet ex eo tempore in diem, in quo seruus sit mortuus, usus fructus aestimetur. Cui illud quoque consequens esse, ut si ipse Titius moriatur, similiter ex eo tempore, quo mora sit facta, in diem mortis aestimatio usus fructus heredi eius praestaretur. 2

Promiser's delay.

Quaesitum est, si, cum in annos decem proximos usum fructum de te dari stipulatus essem, per te steterit quo minus dares et quinquennium transierit, quid iuris sit: item si Stichi decem annorum proximorum operas de te dari stipulatus sim et similiter quinquennium praeteriit. Respondit eius temporis usum fructum et operas recte peti, quod per te transactum est quo minus darentur. **37.** IDEM Quaest. VII.

What is non-use?

Non utitur usufructuarius, si nec ipse utatur nec nomine eius alius, puta qui emit uel qui conduxit uel cui donatus est uel qui negotium eius gerit. Plane illud interest, quod, si uendidero usum fructum, etiamsi **38.** MARCIANUS Inst. III.

[1] *Post* fructus *addit F ex incerta manu* reciperetur plenum *(ex sequentibus).*

[2] *Ita dett.;* legatus *F.*

emptor non utatur, uideor usum fructum retinere, ‖ quia qui pretio fruitur, non minus habere intellegitur, quam qui principali re utitur fruitur. Quod si donauero, non alias retineo, nisi ille utatur. **39.** GAIUS ad edict. prou. VII. **40.** MARCIANUS Inst. III.

Usufruct of statues, or of poor farms.

Statuae et imaginis usum fructum posse relinqui magis est, quia et ipsae habent aliquam utilitatem, si quo loco oportuno ponantur. Licet praedia quaedam talia sint, ut magis in ea impendamus, quam de illis adquiramus, tamen usus fructus eorum relinqui potest. **41.** IDEM Inst. VII. 1

Use and usufruct.

Si alii usus, alii fructus eiusdem rei legetur, id percipiet fructuarius, quod usuario supererit: nec minus et ipse fruendi causa et usum habebit. **42.** FLORENTINUS Inst. XI.

Usufruct in things and in value.

Rerum an aestimationis usus fructus tibi legetur, interest: nam si quidem rerum legetur, deducto eo quod praeterea tibi legatum est, ex reliquis bonis usum fructum feres: sin autem aestimationis usus fructus legatus est, id quoque aestimabitur, quod praeterea tibi legatum est. Nam saepius idem legando non ampliat testator legatum: re autem legata etiam aestimationem eius legando ampliare legatum possumus. 1

Usufruct in a part.

Etiam partis bonorum usus fructus legari potest: si tamen non sit specialiter facta partis mentio, dimidia pars bonorum continetur. **43.** ULPIANUS Reg. VII.

Usufructuary may not make new.

Usufructuarius nouum tectorium parietibus, qui rudes fuissent, imponere non potest, quia, tametsi meliorem excolendo aedificium domini causam facturus esset, non tamen id iure suo facere potest, aliudque est tueri quod accepisset ac nouum facere[1]. **44.** NERATIUS membr. III.

Expenses on sick slaves.

Sicut inpendia cibariorum in seruum, cuius usus fructus ad aliquem pertinet, ita et ualetudinis impendia ad eum respicere natura manifestum est. **45.** GAIUS ad edict. prou. VII.,

Undutiful will.

Si extraneo scripto et emancipato praeterito matri defuncti deducto usu fructu proprietas legata sit, petita contra tabulas bonorum possessione plena proprietas pietatis respectu matri praestanda est. **46.** PAULUS ad Plaut. IX.

[1] ac nouum facere *ex mea coni.*; an nouum faceret *F*; aliud nouum facere *aliquot dett. probante Mommseno.*

Heir directed to repair.

Si testator iusserit, ut heres reficeret insulam, cuius usum fructum legauit, potest fructuarius ex testamento agere, ut heres reficeret. Quod si heres hoc non fecisset et ob id fructuarius frui non potuisset, heres etiam fructuarii eo nomine habebit actionem, quanti fructuarii interfuisset non cessasse heredem, licet usus fructus morte eius interisset. Si absente fructuario heres quasi negotium eius gerens reficiat, negotiorum gestorum actionem aduersus fructuarium habet, tametsi sibi in futurum heres prospiceret: sed si paratus sit recedere ab usu fructu fructuarius, non est cogendus reficere, sed actione negotiorum gestorum liberatur. l 1. **47.** Pomponius ex Plaut. v. **48.** Paulus ad Plaut. ix.

Produce gathered out of season.

Siluam caeduam, etiamsi intempestiue caesa sit, in fructu esse constat, sicut olea immatura lecta, item faenum immaturum caesum in fructu est. l 1.

Usufruct in common charged on heirs in common.

Si mihi et tibi a Sempronio et Mucio heredibus usus fructus legatus sit, ego in parte[1] Sempronii quadrantem, in parte[1] Mucii alterum quadrantem habebo, tu item in utriusque parte eorum quadrantes habes. **49.** Pomponius ad Plaut. vii.

Heir's right to costs.

Titius Maeuio fundum Tusculanum reliquit eiusque fidei commisit, ut eiusdem fundi partis dimidiae usum fructum Titiae praestaret: Maeuius uillam uetustate corruptam necessariam cogendis et conseruandis fructibus aedificauit: quaesitum est, an sumptus partem pro portione usus fructus Titia agnoscere debeat. Respondit Scaeuola, si priusquam usus fructus praestaretur, necessario aedificasset, non alias cogendum restituere quam eius sumptus ratio haberetur. **50.** Paulus ad Uitell. iii.

Usufruct to date before death.

Titio 'cum morietur' usus fructus inutiliter legari intellegitur, in id tempus uidelicet collatus, quo a persona discedere incipit. **51.** Modestinus Differ. ix.

Payment of taxes.

Usu fructu relicto si tributa eius rei praestentur, ea usufructuarium praestare debere dubium non est, nisi specialiter nomine fideicommissi testatori placuisse probetur haec quoque ab herede dari. **52.** Idem Reg. ix.

Building and site.

Si cui insulae usus fructus legatus est, quamdiu quaelibet portio eius insulae remanet, totius soli usum fructum retinet. **53.** Iauolenus Epist. ii.

[1] partem *Codd. Correxi.*

Conveyance while usufruct is contingent.

Sub condicione usus fructus fundi a te herede Titio legatus est: tu fundum mihi uendidisti et tradidisti detracto usu fructu: quaero, si non extiterit condicio, aut extiterit et interiit usus fructus, ad quem pertineat. Respondit: intellego te de usu fructu quaerere qui legatus est: itaque, si condicio eius legati extiterit, dubium non est, quin ad legatarium is usus fructus pertineat, et, si aliquo casu ab eo amissus fuerit, ad proprietatem fundi reuertatur. Quod si condicio non extiterit, usus fructus ad heredem pertinebit, ita ut in eius persona omnia eadem seruentur, quae ad amittendum usufructum pertinent et seruari solent. Ceterum in eiusmodi uenditione spectandum id erit, quod inter ementem uendentemque conuenerit, ut si apparuerit legati causa eum usum fructum exceptum esse, etiamsi condicio non extiterit, restitui a uenditore emptori debeat. **54.** IDEM Epist. III.

Use of infant.

Si infantis usus tantummodo legatus sit, etiamsi nullus interim sit, cum tamen infantis aetatem excesserit, esse incipit. **55.** POMPONIUS ad Q. Mucium XXVI.

Usufruct left to a town.

An usus fructus nomine actio municipibus dari debeat, quaesitum est: periculum enim esse uidebatur, ne perpetuus fieret, quia neque morte nec facile capitis deminutione periturus est, qua ratione proprietas inutilis esset futura semper abscedente usu fructu: sed tamen placuit dandam esse actionem. Unde sequens dubitatio est, quousque tuendi essent in eo usu fructu municipes: et placuit centum annos tuendos esse municipes, quia is finis uitae longaeui hominis est. **56.** GAIUS ad edict. prou. XVII.

Apparent consolidation.

Dominus fructuario praedium, quod ei per usum fructum seruiebat, legauit, idque praedium aliquamdiu possessum legatarius restituere filio, qui causam inofficiosi testamenti recte pertulerat, coactus est: mansisse fructus ius integrum ex post facto apparuit. **57.** PAPINIANUS Respons. VII.

Annuities falling in.

Per fideicommissum fructu praediorum ob alimenta libertis relicto partium emolumentum ex persona uita decedentium ad dominum proprietatis recurrit. 1

Right to produce when due?

Defuncta fructuaria mense Decembri iam omnibus fructibus, qui in his agris nascuntur, mense Octobri per colonos sublatis quaesitum est, utrum pensio heredi fructuariae solui deberet, quamuis fructuaria ante kalendas Martias, quibus pensiones inferri debeant, decesserit, an diuidi debeat inter heredem fructuariae et rem publicam, cui proprietas legata est. Respondi rem publicam quidem cum colono nullam actionem habere, fructuariae uero heredem sua die, secundum ea quae proponerentur, integram pensionem percepturum. **58.** SCAEVOLA Respons. III.

Bequest of share of produce.

'Sempronio do lego ex redactu fructuum holeris et porrinae, quae habeo in agro Farrariorum, partem sextam.' Quaeritur, an his uerbis usus fructus legatus uideatur. Respondi non usum fructum, sed ex eo quod redactum esset partem legatam. Item quaesitum est, si usus fructus non esset, an quotannis partem sextam redactam legauerit. Respondi quotannis uideri relictum, nisi contrarium specialiter ab herede adprobetur. 1 2

Produce of estate.

Arbores ui tempestatis, non culpa fructuarii euersas, ab eo restitui[1] non placet. Quidquid in fundo nascitur uel quidquid inde percipitur, ad fructuarium pertinet, pensiones quoque iam antea locatorum agrorum, si ipsae quoque specialiter comprehensae sint: sed ad exemplum uenditionis, nisi fuerint specialiter exceptae, potest usufructuarius conductorem repellere. Caesae harundinis uel pali compendium, si in eo quoque fundi uectigal esse consueuit, ad fructuarium pertinet. **59.** PAUL. Sentent. III. 1 2

Right of fructuary to possession.

Cuiuscumque fundi usufructuarius prohibitus aut deiectus de restitutione omnium rerum simul occupatarum agit: sed et si medio tempore alio casu interciderit usus fructus, aeque de perceptis antea fructibus utilis actio tribuitur. Si fundus, cuius usus fructus petitur, non a domino possideatur, actio redditur. Et ideo si de fundi proprietate inter duos quaestio sit, fructuarius nihilo minus in possessione esse debet satis- **60.** IDEM Sentent. V. 1

[1] restitui *ex mea coni.*; substitui *Codd.*

que ei a possessore cauendum est, quod non sit prohibiturus frui eum cui usus fructus relictus est quamdiu de iure suo probet. Sed si ipsi usufructuario quaestio moueatur, interim usus fructus eius differtur[1]: sed cauere ei debet de restituendo[2] eo quod ex his fructibus percepturus est, uel si satis non detur, ipse frui permittitur.

Fructuary may not change.

Usufructuarius nouum riuum parietibus non potest inponere. Aedificium inchoatum fructuarium consummare non posse placet, etiamsi eo loco aliter uti non possit, sed nec eius quidem usum fructum esse: nisi in constituendo uel legando usu fructu hoc specialiter adiectum sit, ut utrumque ei liceat. **61.** NERATIUS Respons. II.

Preserves of game.

Usufructuarium uenari in saltibus uel montibus possessionis probe dicitur: nec aprum aut ceruum quem ceperit proprium domini capit, sed aut fructus[3] iure aut gentium suos facit. Si uiuariis inclusae ferae in ea possessione custodiebantur, quando usus fructus coepit, num exercere eas fructuarius possit, occidere non possit? alias si quas initio incluserit operis suis uel post, siue et[4] ipsae inciderint delapsaeue fuerint, hae fructuarii iuris sint? commodissime tamen, ne per singula animalia facultatis fructuarii propter discretionem difficilem ius incertum sit, sufficit eundem numerum per singula quoque genera ferarum finito usu fructu domino proprietatis adsignare, qui fuit coepti usus fructus tempore. **62.** TRYPHONINUS Disput. VII. 1

Usufruct granted while out.

Quod nostrum non est, transferemus ad alios: ueluti is qui fundum habet, quamquam usum fructum non habeat, tamen usum fructum cedere potest. **63.** PAULUS de iure singulari.

How far surrender frees from charges.

Cum fructuarius paratus est usum fructum derelinquere, non est cogendus domum reficere, in quibus casibus et usufructuario hoc onus incumbit. Sed et post acceptum contra eum iudicium parato fructuario **64.** ULPIANUS ad edict. LI.

[1] *Sic Mommsen cum dett.*; offertur *F*.
[2] *Codd.* caueri de restituendo.
[3] *Sic Mommsen*: fructus aut iure *F*; fructus aut iure ciuili *aliquot dett.*
[4] siue et *ex mea coni.*; sibimet *Codd.*

derelinquere usum fructum dicendum est absolui eum[1] debere a iudice. Sed cum fructuarius debeat quod suo suorumque facto deterius factum sit reficere, non est absoluendus, licet usum fructum derelinquere paratus sit: debet enim omne, quod diligens pater familias in sua domo facit, et ipse facere. **65.** Pomponius ex Plautio v.

Heir need not repair.

Non magis heres reficere debet quod uetustate iam deterius factum reliquisset testator, quam si proprietatem alicui testator legasset. 1

Fructuary not to torture slave.

Cum usufructuario non solum legis Aquiliae actio competere potest, sed et serui corrupti et iniuriarum, si seruum torquendo deteriorem fecerit. **66.** Paulus ad edict. xlvii.

Sale of usufruct.

Cui usus fructus legatus est, etiam inuito herede eum extraneo uendere potest. **67.** Iulianus ex Minicio i.

Children are not produce.

Uetus fuit quaestio, an partus ad fructuarium pertineret: sed Bruti sententia optinuit fructuarium in eo locum non habere: neque enim in fructu hominis homo esse potest. Hac ratione nec usum fructum in eo fructuarius habebit. Quid tamen si fuerit etiam partus usus fructus relictus? an habeat in eo usum fructum? et cum possit partus legari, poterit et usus fructus eius. Fetus tamen pecorum Sabinus et Cassius opinati sunt ad fructuarium pertinere. Plane, si gregis uel armenti sit usus fructus legatus, debebit ex adgnatis gregem supplere, id est in locum capitum defunctorum || uel inutilium alia summittere, ut post substituta ea fiant priora[2] fructuarii, ne lucro ea res cedat domino. Et sicut substituta statim domini fiunt, ita priora quoque ex natura fructus desinunt eius esse: nam alioquin quod nascitur fructuarii est, et cum substituit, desinit eius esse. Quid ergo si non faciat nec suppleat? teneri eum proprietario Gaius Cassius scribit libro decimo iuris ciuilis. Interim tamen, quamdiu summittantur et suppleantur capita quae demortua sunt, cuius sit fetus, quaeritur. Et Iulianus libro tricensimo quinto digestorum scribit pendere eorum dominium, ut, si summittantur, sint proprietarii, si non **68.** Ulpianus ad Sab. xvii.

Young of animals are. 1

Case of herd. 2

69. Pomponius ad Sab. v.

70. Ulpianus ad Sab. xvi 1

[1] eam *F.* [2] *Codd.* substituta fiant propria. *Uide adnotationem.*

summittantur, fructuarii: quae sententia uera est. Secundum quae, si decesserit fetus, periculum erit 2
fructuarii, non proprietarii, et necesse habebit alios fetus summittere. Unde Gaius Cassius libro octauo scribit carnem fetus demortui ad fructuarium pertinere. Sed quod dicitur debere eum summittere, 3
totiens uerum est, quotiens gregis uel armenti uel equitii, id est uniuersitatis, usus fructus legatus est: ceterum, si singulorum capitum, nihil supplebit. Item 4
si forte eo tempore, quo fetus editi sunt, nihil fuit quod summitti deberet, nunc est[1] post editionem: utrum ex his quae edentur summittere debebit, an ex his quae edita sunt, uidendum est. Puto autem uerius, ea quae pleno grege edita sunt ad fructuarium pertinere, sed posteriorem gregis casum nocere debere fructuario. Summittere autem facti est, et Iulianus proprie dicit 5
dispertire et diuidere et diuisionem quandam facere: quod dominium erit summissorum proprietarii.

Building on plot.

Si in area, cuius usus fructus alienus esset, quis aedificasset, intra tempus quo usus fructus perit superficie sublata, restitui usum fructum ueteres responderunt. **71.** MARCELLUS Digest. XVII.

Contingent legacy by bare owner.

Si dominus nudae proprietatis usum fructum legauerit, uerum est, quod Maecianus scripsit libro tertio quaestionum de fideicommissis, ualere legatum: et si forte in uita testatoris uel ante aditam hereditatem proprietati accesserit, ad legatarium pertinere. Plus admittit Maecianus, etiamsi post aditam hereditatem accessisset usus fructus, utiliter diem cedere, et ad legatarium pertinere. **72.** ULPIANUS ad Sab. XVII.

Building on plot.

Si areae usus fructus legatus sit mihi, posse me casam ibi aedificare custodiae causa earum rerum, quae in area sint. **73.** POMPONIUS ad Sab. V.

Usufruct left to common slave.

Si Sticho seruo tuo et Pamphilo meo legatus fuerit usus fructus, tale est legatum, quale si mihi et tibi legatus esset: et ideo dubium non est, quin aequaliter ad nos pertineat. **74.** GAIUS ad edict. prou. VII.

[1] *Codd. dett.* est; *F* et.

NOTES.

l 1. **usus fructus**] 'use and produce'. Cf. Cic. *Top.* 3 § 17; 4 § 21. The conjunction is sometimes expressed, e.g. Cic. *Caecin.* 4 § 11 *usum et fructum omnium bonorum suorum Caesenniae legat* (some MSS. omit *et*); 7 § 20 *usus enim eius fundi et fructus testamento uiri fuerat Caesenniae; Fam.* VII. 30 § 2 *proprium te esse scribis mancipio et nexo, meum autem usu et fructu;* Sen. *Ep.* 73 § 9; 98 § 11 *rem nobis eripit casus, usum fructumque apud nos relinquit.* So also *uti frui.* Other like combinations are *sarta tecta* (see note on l 7. § 2); *ruta caesa* (Cic. *Top.* § 100); *ruta et caesa* (D. XIX. 1. l 17. § 6). In some other expressions two correlative sides of the same transaction are named, e.g. *empti uenditi actio* (D. XIX. 1), *locati conducti* (ib. 2); and probably *pactum conuentum* (D. II. 14. l 7. § 7).

ius] The usufruct e.g. of a landed estate, is not the estate itself, nor the produce of the estate, but the right to use it and to take the produce. Hence it is *ius* 'a right', as opposed to *corpus*, a physical or corporeal thing, for which *res* is often used, though *res* is also a general term including *iura*. Cf. Gai. II. 12—14 *Quaedam res corporales sunt, quaedam incorporales. Corporales hae quae tangi possunt, uelut fundus, homo, uestis, aurum, argentum, et denique aliae res innumerabiles. Incorporales sunt quae tangi non possunt, qualia sunt ea quae iure consistunt, sicut hereditas, usus fructus, obligationes quoquo modo contractae.* D. v. 3. l 17. § 2 (Gaius) *Placuit uniuersas res hereditarias in hoc iudicium uenire, siue iura siue corpora sint;* XXXIX. 2. l 13. § 1 (Ulp.) *siue corporis dominus siue is qui ius habet, ut puta seruitutem;* ib. l 19. pr. *siue domini sint siue aliquid in ea re ius habeant, qualis est creditor et fructuarius et superficiarius.*

alienis] No one can have a usufruct or any other easement in his own thing. *Qui habet proprietatem, utendi fruendi ius separatum non habet; nec enim potest ei suus fundus seruire* (D. VII. 6. l 5. pr.). But a man may have a usufruct in a thing which is the common property of himself and another (2. l 9).

salua rerum substantia] 'without consuming the things themselves'. The use of a thing in ordinary language generally implies the continuance of the thing after the use; using it up or consuming it is a different matter (see note on *abuti*, p. 117). None but the owner enjoys and can

destroy if he choose: a usufructuary is not as such entitled to consume the thing itself, even though he replace it. A quasi-usufruct was, however, introduced by a Senate's decree (in or before Tiberius' reign) in the case of things consumable in use but capable of being replaced by like quantities of the same kind of thing (D. VII. 5. l 1; l 7). The relation between usufruct and this quasi-usufruct was analogous to that between *commodatum* and *mutuum* (D. XLIV. 7. l 1. §§ 2, 3).

l 2. **ius in corpore**] 'right of dealing with a material thing'. There cannot be a usufruct of an incorporeal thing, e.g. of a servitude. *Nec usus nec usus fructus itineris, actus, uiae, aquae ductus, legari potest, quia seruitus seruitutis esse non potest* (D. XXXIII. 2. l 1). But a life-enjoyment of a road or other servitude may be otherwise secured (ib.). This principle was probably the origin of the doctrine that 'no use could be limited on a use', applied by the Court of Chancery to reestablish trusts after the Statute of uses (Blackstone *Com.* II. 335).

quo sublato] The destruction of the thing involves, of course, the destruction of any usufruct in it. Cf. D. VII. 4. l 5. § 2, &c.

l 3. pr. **omnium praediorum**] (*a*) 'All' i.e. 'any, landed estates' ='every landed estate'. So *omni fructuario* l 25. fin. Cf. Cic. *Att.* I. 16. § 12 *Philippus omnia castella expugnari posse dicebat in quae modo asellus onustus auro posset ascendere;* D. I. 16. l 9. § 1 *Omnia quaecumque causae cognitionem desiderant, per libellum non possunt expediri.* Below in l 29 *omnium* is used collectively. See note.

(*b*) *praedia* is a general term for 'landed property'. The term is due to the habit of giving real as well as personal security. Cf. Cic. *Verr.* I. 54. § 142 *ubi illa consuetudo in bonis praedibus praediisque uendundis omnium consulum?* Cf. *Lex Agrar.* (Bruns) vv. 74, 84; *Lex Malac.* §§ 60—65. *Praedia urbana* are town houses, though in some connexions a residence or even lodgings or stables for hire in the country may be so called (D. L. 16. l 198; VIII. 4. l 1; cf. XX. 2. l 4): *praedia rustica* are farms (including the farm-houses and buildings) or nursery gardens (D. L. l. c.).

(*c*) The expression *omnium praediorum &c.* seems naturally to be used in a contrast with some other mode of legacy which applied only to *some* landed estates. Now before Justinian a legacy had different conditions and incidents according to the form in which it was couched (see Gai. II. § 192 sqq.; Ulp. XXIV. § 2 sqq.; Paul. *Sent.* III. 6. 1 sqq.). The two principal forms were *per uindicationem* and *per damnationem.* The former gave the legatee the property in the thing bequeathed immediately on the will being made effective by the heir's entering. But it was a necessary condition of this form of legacy that the thing bequeathed should have been at the time of the testator's death his property *ex iure Quiritium.* The scope of this form of bequest was therefore limited. Things which were merely *in bonis* (and to this *ex iure Quiritium* is usually opposed cf. Gai. I. 54; II. 40, 41; Cod. VII. 25) could not be so bequeathed; nor could things which belonged to another person altogether. This form was not therefore

applicable to all *praedia*. A senate's decree however, passed on the proposal of Nero, cured this defect in practice, and declared that, even if a thing had not belonged to the testator, it might pass by this form of bequest, as well as if it had been left in the form most widely applicable. Such a form was the legacy *per damnationem*, by which the heir was bound to convey the property in the thing bequeathed to the legatee, whether it was or was not the testator's in the strictest or in any sense. If it belonged to some one who would not part with it, the heir was liable for the value (Gai. II. 202; D. XXXII. l 14. § 2). The legatee had by the will no property in the thing bequeathed: he had only a claim on the heir to procure it and convey it. It is clearly this form of bequest that is here referred to as applicable to all *praedia* (see note on *iubeatur dare*, p. 34). On this view the use of *omnium* has an intelligible force, and the words may therefore have been written by Gaius as the Digest gives them. Indeed Ulpian XXIV. §§ 7, 8, after describing *per uindicationem legari*, proceeds *Per damnationem omnes res legari possunt etiam quae non sunt testatoris, dum modo tales sint quae dari possint.* This parallel gives strong support to the above view.

(*d*) Hasse (*Rhein. Mus.* I. pp. 110 sqq.) and Arndts (in Glück's *Pand.* XLVI. p. 19, note) suggest that Gaius wrote *prouincialium* (*praediorum*) and that Tribonian substituted *omnium*. This supposition derives some support from its affording a ready explanation of the next sentence. If Gaius is speaking only of provincial land, the mention of bargains and stipulations as the mode of constituting a usufruct *inter uiuos* becomes intelligible (see Gai. II. 31). Otherwise we must suppose a considerable omission by Tribonian (see p. 35). This view of Hasse's rests however on the principle, generally held, that bequest by vindication (whether of the property or of the usufruct) was not applicable to provincial land (except of course such as had received Italic rights, Plin. III. § 25; § 139; Savigny *Verm. Schr.* I. p. 30 sqq.). Land in the provinces was not capable of mancipation (Gai. II. 15); nor of surrender in court (ib. 31), nor of usucapion (ib. 46). So much is certain: but I find no such express statement as regards vindication: and legacy by vindication and surrender in court have not always like incidents (Vat. Fr. 49). But in vindication, as in mancipation and surrender in court, the claimant had to assert that the thing was his *ex iure Quiritium;* and bequest *per uindicationem* was applicable only to things which were the testator's *ex iure Quiritium*. So that the question is, Could a Roman citizen assert that land in the provinces (in places not specially excepted from the ordinary provincial law by being made *Italici iuris*) was his *ex iure Quiritium?* Now the rights enjoyed by the Quirites as owners of property covered all kinds of property corporeal and incorporeal, moveable and immoveable, but did not follow the lines indicated by these distinctions. The chief Roman division of things as subjects of property was into *res mancipi* and *res nec mancipi*. *Res mancipi* contained all immoveables in Italy, some moveables, viz. slaves and beasts of draught, and some incorporeal things, viz. *seruitutes prae-*

diorum rusticorum. Immoveables out of Italy (except those *Italici iuris*), all moveables except slaves and beasts of draught, and other incorporeal things, even *seruitutes praediorum urbanorum*, were *res nec mancipi* (Gai. II. 12—17). But *res nec mancipi* were owned *ex iure Quiritium* just as much as *res mancipi*. Money could be claimed by vindication, and could be bequeathed *per uindicationem* (Gai. II. 196) as much as a slave or a house or land. The difference was merely in the mode of conveyance. It needed only simple delivery on the part of the owner to pass the property in money (*res nec mancipi ipsa traditione pleno iure alterius fiunt*, Gai. II. 19), and land in the provinces was in the same position (*in eadem causa sunt prouincialia praedia*); that is to say, mere delivery at once vested in a person the full rights of ownership in provincial land. And 'full rights' (*plenum ius*) was expressly used by Gaius to denote not merely the practical control, but the strict right of ownership, (*proinde pleno iure incipit, id est et in bonis et ex iure Quiritium, tua res esse*, II. 41). The proof seems clear and complete, that provincial lands, duly delivered by their owner, became the property of the new acquirer *ex iure Quiritium*. Unfortunately two sections of Gaius (II. 26, 27) which very probably dealt with this question, are so imperfectly preserved that their purport is unknown. Huschke (notes *ad loc.*) supposes that they contained an express warning against this conclusion. That is mere hypothesis; but there are two lines of argument which are brought against the conclusion and require distinct notice.

(*e*) The first is derived from the language of Gaius II. 7, and of a passage in Aggenus Urbicus which Lachmann attributes to Frontinus. Gaius says *In prouinciali solo placet plerisque solum religiosum non fieri, quod in eo solo dominium populi Romani est uel Caesaris, nos autem possessionem tantum uel usum fructum habere uidemur*[1]. Frontinus or Aggenus (*Grom.* p. 56) in contrasting the legal position of land in Italy and land in the provinces says of the *agri stipendiarii* (i.e. taxed lands in the senatorial provinces, Gai. II. 21) *nexum non habent, neque possidendo ab alio quaeri possunt, possidentur tamen a priuatis sed alia condicione, et ueneunt sed nec mancipatio eorum legitima potest esse. Possidere enim illis quasi fructus tollendi causa et praestandi tributi condicione concessum est. Uindicant tamen inter se non minus fines ex aequo ac si priuatorum agrorum* (cf. Gai. II. 26). Theophilus *Inst.* II. 1 § 40, probably borrowing from Gaius, says that those who occupied the provincial lands subject to tribute or tax, were

[1] Cf. the English feudal law: "All the lands and tenements in England in the hands of subjects are holden mediately or immediately of the king." Coke on Litt. p. 1 *a*; Blackstone, *Com.* II. p. 59. "Absolute ownership is an idea quite unknown to the English law. No man is in law the absolute owner of lands. He can only hold an estate in them." Josh. Williams, *Real Prop.* ch. I. "In many of the United States there were never any marks of feudal tenure, and in all of them the ownership of land is essentially free and independent" i.e. either really allodial or only nominally feudal, although much of the technical language of feudality is still preserved. Kent, *Comm.* Pt. VI. Lect. 53 (Vol. III. p. 488=638 ed. 9).

not *domini* but had only the usufruct and fullest possession (see, amongst others, Matthiass *Grundsteuer*, p. 31 sqq.). Now it will be observed that Gaius does not speak of this theory as more than a lawyer's interpretation of the facts (*habere uidemur*, cf. Gai. II. 89); and in its application to the question of land becoming *religiosus*, implies that some (for he says only *plerisque*) drew no distinction between Italian and provincial land. As this theory gave ownership to the State, the provincials could have only some inferior right, which he calls loosely 'possession or usufruct'. That Gaius did not regard it as technically a usufruct is clear from his saying that provincial lands passed by delivery, and that usufructs did not. In truth he uses 'possession or usufruct' simply to denote the *de facto* position of an owner, which yet theory prevented him from calling ownership. Such a *de facto* position Frontinus also attributes to provincial lands. They were not capable of strict mancipation, or of usucapion: but they could be possessed, could be sold, and could be vindicated: only they had to pay taxes or ground-rent, and that did not accord with the Roman conception of an owner. Ownership therefore in this case lay with the sovereign who took taxes or ground-rent from the provincials by the same principle that a lessor takes rent from a lessee. So the tenure of the provincials must be reduced to possession or usufruct conditional on their paying taxes. Now it is curious that these same expressions ('possession', 'usufruct') are demonstrably used of owners in the provinces who were not subject to taxes. The *lex Antonia de Termessibus* A. U. C. 683 (*Corp. I. L.* I. No. 204 = Bruns, p. 85) declared the Thermenses in Pisidia to be free, friends, and allies of the Roman people and to enjoy their own laws: they are to continue to have, possess, use and enjoy (*habere possidere uti fruique*) lands, buildings and all other things public and private which they have hitherto had, possessed, used and enjoyed, and had not voluntarily parted with (capp. 2, 3). The same terms appear to be also used of holders of land in various legal positions in Italy in the *lex agraria* A. U. C. 643 (*Corp. I. L.* I. No. 200 = Bruns, p. 67) and of some (line 12) who held land 'given and assigned' them by agrarian commissioners and presumably therefore in private ownership (cf. Rudorff *Grom. Inst.* p. 372; *contra* Mommsen *C. I. L.* pp. 90 *b*; 101 *a*). They are in deeds of purchase of slaves, Bruns, pp. 206, 207.

(*f*) Some words in this passage of Frontinus deserve especial note. Rudorff takes *uindicant ex aequo* as opposed to *ex iure Quiritium* and to mean (I suppose) 'on grounds of equity' (*Grom. Inst.* pp. 317, 375). That however is *ex aequo et bono*. But *ex aequo* is 'on a level', 'on equal terms' (Liv. XXXVII. 36 § 5; Plin. *H. N.* VI. § 112; Suet. *Tib.* 11; Tac. *Germ.* 36) and either contrasts the position of provincials amongst themselves with the position of the whole of them relative to the Roman State, (in which case *ac si* goes with *non minus*—a possible but not a frequent use of *ac*; cf. Catull. 61, 169 *illi non minus ac tibi*, Verg. *A.* III. 561 *haut minus ac iussi faciunt*); or compares the position of these holders of usufruct and possession with that of private owners; which seems the

more natural meaning and construction. 'Not the less however do they assert against one another their claims to their boundaries just as if the land was their private property'. (For *non minus*, cf. l 39; for *ex aequo* compare *Laudatorum principum usus ex aequo* (Tac. *H.* 74); *qui pluribus locis ex aequo negotiatur*, i.e. just as much in one place as another, D. L. 1. l 5). But though vindication is thus expressly applied to provincial lands, the passage is not decisive of the present question, as it relates to the action of provincials, who certainly could not claim land *ex iure Quiritium*. They were debarred from doing so, not on account of the incapability of the land but of their own personal incapacity. The form doubtless would be modified accordingly.

(*g*) The second line of argument is that used by Savigny, who rightly regarded this theory of the Roman jurists as scarcely more than an hypothesis or a publicist fiction, and one of no importance in private transactions (*Besitz* § 9. 2, note; *Verm. Schr.* I. p. 46; II. p. 104). Savigny therefore regards all land in the provinces whether in the free communities or subject to tax or tribute (with the exception only of land made *Italici iuris*), as incapable of Quiritary ownership, on the general ground that immoveables are regulated by the law of the country where they are situate[1]. But in the first place one is giving fair weight to this principle, if we presume the conditions of conveyance required among the inhabitants of Illyria or Cilicia to be followed by Roman citizens desirous of holding land there. It would surely be carrying it too far to assert that a Roman citizen, having so acquired it, cannot hold it as his property. And if it be his property, does he not hold it *ex iure Quiritium*[2]? Gaius expressly says, delivery conveys the full property in provincial lands. A Roman citizen gets an estate delivered to him in Cilicia by the owner; how can we say this estate is not his *ex iure Quiritium*? For *ex iure Quiritium* does not imply that it must be acquired by methods peculiar to the Quirites: it simply means 'in accordance with rights enjoyed by the Quirites' (cf. *ius Quiritium consecuntur*, Gai. I. 32 *c*, 35, &c.), and delivery was just as much in accordance with those rights as regards one class of things, as mancipation and surrender in court and usucapion were as regards others.

And in the second place the distinction between moveables and im-

[1] Savigny's words are *Der wahre und allgemeine Grund jener Unmöglichkeit lag in der höchst natürlichen Regel die der französische Code Art.* 3 *so ausdrückt: Les immeubles, même ceux possédés par des étrangers, sont régis par la loi française.* Böcking (*Pand.* § 74 n. 25) quite misunderstands this, as if *par la loi française* were analogous to the Roman law, instead of to the law of the place, whether Italian or provincial.

[2] Part of Mommsen's words used of the Gracchan colonies in Africa are exactly applicable *Agrum in prouinciis situm fieri potuisse dominorum ex iure Quiritium Rudorffius rectissime docet* (Feldm. II. 373) *estque haec condicio agri quae postea ius Italicum appellatur; hac uero aetate quicquid ciuis Romani iure fuit, eius fuit ex iure Quiritium, nec nisi multo posteriore iureconsulti inuenerunt agrum a populo Romano ciui Romano ita dari posse ut eius esset iure peregrino* (*Corp. I. L.* I. p. 97 *b*).

moveables was not the one ruling the Roman notions on these matters. They probably felt the inconvenience of these special modes of conveyance, and extended them no further than they could help. They classed provincial lands with *res nec mancipi*, as they classed camels and elephants with *res nec mancipi*, for the simple reason that neither being known when the form of *mancipium* was the regular conveyance for all important property, sentiment did not require the application of this form, and convenience forbad its extension. But they did not give up the claim to ownership, because they refused to force the use of a burdensome conveyance, and they held as Roman citizens what they acquired by mere delivery, whether moveable or immoveable, if it was not included in the limited number of things which formed the early Roman farmer's holding and stock, and which were only parted with under the solemn forms of an ancient ceremonial.

(*h*) I do not lay stress in this argument on the occasional use in the Vatican fragments of the terms *dominus*, *dominium* (§§ 315, 316) or *proprietas* (§ 315) applied to stipendiary lands, for these words might be used somewhat loosely of what all recognised to be *de facto* ownership. Nor can much support be drawn from the fact that, even if the provincial lands were held only as a usufruct, still usufructs were capable of being vindicated (D. VII. 6. l 5. § 1); for, as I have shewn, this would be taking Gaius' language too literally. Nor do I discuss whether any form of bequest, the same as, or similar to, that by the words *do lego* (see note on l 19. pr.), was used by the provincials. All that I question is whether there is any sufficient reason for supposing that a bequest, by a Roman citizen to a Roman citizen, in the words *do lego*, of an estate in the provinces, subject to tax, would have been invalid even before the passing of the senate's decree in Nero's time.

iure legati] There is a special title on the subject of bequests of usufruct and the like, D. XXXIII. 2. Bequest was evidently the principal way of treating a usufruct, and very probably the earliest. See note on l 25. § 7. The desire of providing according to their several ages and needs for the members of a testator's family naturally led to the practice of giving a life interest in certain property to some, while giving the property itself, subject to the life interest, to others.

On the origin of *legatum*, *legare* see note on l 19. pr.

constitui] 'created'. *Constituere* is frequently used in this sense ('create', 'establish', 'settle', 'appoint') of bringing definitively into being a legal relation. So especially of creating a usufruct or other easements (Gai. II. 31; Vat. Fr. 47, 48, 52, 77, 82, &c.; D. VIII. 1. l 5. pr., &c.); of creating an obligation (D. XLIV. 7. l 3. § 1); of settling a price (*uniuersis mancipiis constitutum pretium*, D. XXI. 1. l 36), or the amount of a debt (D. XIII. 5, *de pecunia constituta*); of obtaining a new *status* (*sui iuris constitutos*, D. XXV. 3. l 5. § 1); of making a person surety (*qui pro se constituisset mulierem ream*, D. XVI. 1. l 1. § 2); of appointing a procurator

(Gai. IV. 84) or guardian (ib. 85). It is frequently used of the action of the Emperor, senate, people, or other legislative authority (D. I. 2. l 2, *passim;* 3. l 3, l 8, l 11, &c.).

ut heres iubeatur dare] These words point to a legacy *per damnationem* which is thus described by Gaius II. 201 *Per damnationem hoc modo legamus, 'Heres meus Stichum seruum meum dare damnas esto': sed et si 'dato' scriptum fuerit, per damnationem legatum est.* See also above, p. 28, bottom. The difference between the two forms of legacy, that by *do lego* and that by *heres dare damnas esto*, was in fact the difference between giving a right to the thing, and giving a claim on the heir: the former gave a real title (*uindicatio*); the latter a personal obligation; the former legatee said *rem meam esse;* the latter *heredem rem dare oportere.*

dare] The English word 'give' corresponds fairly with *dare*, except that *dare* does not imply, as 'give' sometimes does, 'give gratuitously' 'make a present of'. That is *donare* or *dono dare* (D. XXXIX. 5. l 1. pr.; XLIV. 7. l 3. § 1). *Dare* is the opposite of *accipere*, and means 'to grant' or 'make over' from oneself to another in wide extent of application, either of incorporeal things, e.g. *dare responsum, testimonium, operas, ueniam, causam, libertatem, priuilegium, iura, actionem, exceptionem, usumfructum, iter* ('right of road') &c.; or of persons appointed, e.g. *dare tutorem, iudicem;* or of corporeal things, the context alone deciding the purpose of the business, e.g. *libellum dare*, 'give in a petition'; *pecuniam*, 'pay over money' (D. XII. 4; *soluere* would imply a previously existing debt); *mutuum*, or *mutuam pecuniam*, 'pay over money in exchange' for money afterwards to be paid back, i.e. 'to make a loan', the property in the coins being conveyed; *rem utendam*, 'to lend' (D. XIII. 6. l 1. § 1); *rem custodiendam*, 'to deposit for safe keeping' (D. XVI. 3. l 1. pr.); *rem pignori* 'to pledge' (D. XIII. 7. l 1). See Böcking *Pand.* § 83 *h. Dare* is frequently used in opposition to *facere*, e.g. D. XIX. 5. l 5 pr.; so especially in stipulations and in the forms used in personal actions, in both of which it meant a transfer of the property in a thing (Gai. III. 99; IV. 4; D. XLV. 1. l 56. § 7; l 126. § 1; XLVI. 1. l 75. § 10, &c.). The word occurs in both the principal forms of legacy, that which gave a real action having the words *do, lego;* that giving a personal action against the heir on the will (D. XLIV. 7. l 5. § 2) having *heres dare damnas esto* or *heres dato* (Gai. II. 193, 201). This use of *do* with another more specific verb is like the form used of grants of public land in full ownership to private persons *dedit adsignauit* (*Lex Agrar.* 3, 7, 11, 16, &c.), which was so technical that it was inscribed on the boundary-stones, '*datus adsignatus*' (Sic. Flacc. in *Grom.*, p. 156, ed. Lachm.). It will be seen that the general meaning of *dare* 'give over', 'convey', is in each case made more definite by the addition of a precise term (*adsignare, legare, pignori, mutuum, utendum, custodiendum, &c.*).

intellegitur, si induxerit] The meaning of *dare* would naturally vary with the subject of the legacy. If a landed estate was left (not *per uindicationem*) the heir would convey the property and give the legatee possession.

Legatarius in personam agere debet, id est intendere heredem sibi dare oportere, et tum heres si (res) mancipi sit, mancipio dare aut in iure cedere possessionemque tradere debet: si nec mancipi sit, sufficit si tradiderit (Gai. II. 204). A usufructuary did not possess in the strict sense, for he did not hold, or claim to hold, as owner: but he of course had, or was entitled to have, the physical possession of that of which he had the usufruct. Gaius says (II. 93) *usufructuarius non possidet, sed habet ius utendi fruendi.* Ulpian (D. X. 2. l 5. § 1) speaks of him *qui ususfructus nomine rem teneat, quamuis nec hic utique possideat;* and again (D. XLIII. 16. l 3. § 17) *Qui ususfructus nomine qualiterqualiter fuit quasi in possessione, utetur hoc interdicto;* and again, *non possidet legatum, sed potius fruitur* (Vat. Fr. 90). The heir has so far as possible to effect this. If the ownership of the land is not in the heir, either as part of his own estate, or of that of the testator and not bequeathed away from him, the heir has to 'induct' the legatee of the usufruct, i.e. put him into the *de facto* possession. If the ownership of the estate is in the heir, it is only necessary that *patiatur eum uti frui.*

The term *induxerit* is used of a *fideicommissum* by Gaius (D. XXXIII. 2. l 29) *Si quis usumfructum, legatum sibi, alii restituere rogatus sit, eumque in fundum induxerit fruendi causa;* and by Ulpian (D. XLIII. 4. l 3. pr.) *Si quis missus fuerit in possessionem fideicommissi seruandi causa et non admittatur, potestate eius inducendus est qui eum misit;* and of a gift in a rescript of the year 249, *Perfectis donationibus in possessionem inductus* (Vat. Fr. 272). In an opposite sense was used *deducere* in Cicero's time of the formal turning out of possession, Cic. *Caecin.* 7; *Tull.* 16 *appellat Fabius ut aut ipse Tullium deduceret aut ab eo deduceretur. Dicit deducturum se Tullius.*

et sine testamento] It is clear to any one, reading Gai. II. 28—33, that unless this passage was originally applicable only to provincial lands (see note above on *omnium*) it must have been much altered by Tribonian. At least some such words as those following in brackets must have been cut out. *Et sine testamento si quis uelit usumfructum constituere* [*in Italicis quidem praediis ualet in iure cessio, et in mancipanda proprietate ususfructus detrahi potest, in prouincialibus autem praediis*] *pactionibus et stipulationibus id efficere potest.* In Gaius' time there were two modes of establishing by private act a usufruct (as well as other servitudes), viz. either by a legacy in the form *do lego* or by a surrender in court. Moreover mancipation was available to establish a usufruct in the person of the owner himself, who might, in conveying the property by mancipation, reserve to himself the usufruct (Vat. Fr. 47). But the legacy *do lego* was restricted in its application; and surrender in court and mancipation did not apply to land outside of Italy (except such as had received the *ius Italicum*), though they did apply to slaves and animals. Nor was either form available except where both parties were Roman citizens. Some substitutes for these forms had to be adopted. The difficulty inherent in

the *do lego* bequest was met by the testator, instead of at once conveying the property by will to the legatee, imposing (*per damnationem*) on his heir the duty of putting the legatee into possession. The difficulty as regards the conveyance *inter uiuos* was met in a similar way. A bargain (*pactio*) was made, and in order that it might be legally enforceable, the bargain was ratified by a formal stipulation. The bargain, i.e. the statement of the right intended to be created, and the conditions thereof, was in fact the material portion of a surrender in court or of a mancipation, *minus* the solemn procedure. In lieu of this solemn procedure, a stipulation was added. It is natural to suppose that, just as in the bequest *per damnationem*, the testator's words were followed by a quasi-delivery on the part of the heir, so in this case the spoken bargain was followed or accompanied by a quasi-delivery. But was such a quasi-delivery necessary to the valid establishment of the usufruct? It is not said so; and the opinions of modern jurists are greatly divided on the question. It was not, after Justinian, necessary in case of a legacy; for any and every legatee by Justinian's constitution (Cod. VI. 43. l 1. § 1) had the right to bring *uindicatio* and therefore a complete title, and he could call on the heir to give him the *de facto* enjoyment. There are, however, no such positive words in the case of an establishment of a usufruct *inter uiuos*. But if and when, either for the perfecting of his title, or for the enjoyment of his right, the fructuary was put or came into actual possession of the land, he would have a right to the protection afforded by the interdicts (D. VIII. 1. l 20), e.g. the *interdictum uti possidetis* (D. XLIII. 17. l 4), and the interdict *de ui* (ib. 16. l 3. § 13 sqq.), and (presuming the due conditions) to the *actio Publiciana* (D. VI. 2. l 11. § 1; cf. D. XLIII. 18). These interdicts were called *utiles*, i.e. not strictly legal, but 'practically available' because the possession of the fructuary was not a possession as owner (Vat. Fr. 90—92); and moreover, so far as provincials were concerned, was outside of the civil law. Whether, without thus being in physical possession, the fructuary could by the force of bargain and stipulation have an action not only against the promiser and his heirs, but also against the assignee of the promiser or against any other owner of the reversion, is a question not easily determinable (cf. D. XLIV. 7. l 3; VII. 9. l 3. § 4). See the discussion and references in Vangerow, § 350; Baron, § 167; Vering, § 155; Wächter, § 159; Jhering *Jahrbuch*, X. p. 553 sqq.; Karlowa *Rechtsgeschäft*, § 35. For English law see Spencer's case and the commentators on it (Smith's *Leading Cases*).

Both the forms of mancipation and surrender in court went out of use before Justinian, though the word *mancipare* was used in law-deeds afterwards, apparently merely as an old term. The actual ceremonies probably ceased in the fourth century, a shadow of mancipation remaining for a time in solemn delivery before five witnesses (Voigt *Ius Nat.* II. 925—936, 938). Justinian expressly abolished the distinction between *res mancipi* and *nec mancipi* (Cod. VII. 31); and when speaking of establishing a

servitude by legacy he adopts the language suitable to the *legatum per damnationem* (D. VIII. 1. l 16=Just. II. 3. § 4), that being the most generally applicable, and any specific distinction between the forms of bequest being abolished (Just. II. 20. § 2 ; Cod. VI. 43. l 1. § 1).

pactionibus] (*a*) There is no apparent reason why the plural should be used in this context, *si quis uelit usumfructum constituere potest.* Nor have I found any instance of it applied to a singular subject in the Digest. Justinian's *Institutes* have it applied in the same words to usufruct in II. 4. § 1, and to real servitudes in II. 3. § 4. The latter section is mainly taken from the same book of Gaius (*Rer. Cott.* II.) from which our passage comes (see D. VIII. 4. l 16). Probably Gaius used the plural, because he was speaking both of real and personal servitudes, precisely as he does in II. 31, and Tribonian has cut out real servitudes, as he probably cut out the distinction between Italian and provincial lands (see above on *et sine testamento* p. 35).

(*b*) *Pactio* is used indifferently with *pactum*, except in the old phrase *pactum conuentum ;* see D. II. 14. Ulpian defines it as *duorum pluriumue in idem placitum consensus*, and proceeds to explain *conuentio* as the most general word applicable to every contact of persons out of which an obligation arises (ib. l 1). *Contractus* is used mainly in opposition to *delictum*, these being the two chief sources of obligation. *Pacta, pactiones* are used generally of bargains which are not made in the solemn form of stipulation, nor are denoted by such special names as *emtio, uenditio, societas, depositum*, &c. (ib. l 1. § 4 ; l 7. § 1), but are preparatory or ancillary to other contracts (see note on l 23). In D. L. 17. l 73. § 4 (taken from the old jurist Q. Mucius Scaevola) we have a further point of distinction *nec paciscendo nec legem dicendo nec stipulando quisquam alteri cauere potest. Lex* is frequently used, both in lay writers (e.g. Plaut. *Most.* 352 ; *Trin.* 1162, &c. ; Cic. *Att.* VI. 3. § 1 ; *Verr.* V. 70. § 180 ; Liv. XXXIII. 30. § 1 ; cf. Pernice *Labeo* I. p. 474) and legal, of the terms of a contract or disposition of property, especially as imposed by the owner or superior party. So *in mancipii lege dicere* (Cic. *Or.* I. 39. § 178) ; *ea lege mancipio dedit* (Gai. I. 140) ; *ea lege praedia locare* (ib. III. 145) ; *gladiatores ea lege tradere* (ib. 146) ; *hanc legem uenditionis* (D. XVIII. 1. l 22) ; *ex lege donationis* (D. XL. 2. l 16. § 1 ; Cod. VIII. 53. l 9 ; 54. l 2), and see D. VIII. 4. l 13. pr. Originally the *lex* or *leges* were stated in the formal declaration (*nuncupatio*, Fest. p. 173) attending a mancipation, and would be distinguished from the previous bargain (*pactio*), which was thus carried into effect. After a time the covenants were made the subject of an attendant stipulation, the mancipation itself became more and more a form, and, as the contents were reduced to writing, the oral declaration was probably often abridged or omitted. The contents, except in case of difference between them (cf. D. VIII. 2. l 35), might be referred to under the name either of *pactum* or *lex* (cf. D. II. 14. l 7. § 5 *ea enim pacta insunt, quae legem contractui dant*).

(*c*) The creation of servitudes in connexion with the delivery of land is often spoken of e.g. *Haec lex traditionis 'stillicidia uti nunc sunt ut ita sint', hoc significat impositam uicinis necessitatem stillicidiorum recipiendorum* (D. VIII. 2. l 17. § 3). *Si quis duas aedes habeat et alteras tradat, potest legem traditioni dicere, ut uel istae quae non traduntur seruae sint his quae traduntur, uel contra ut traditae retentis aedibus seruiant* (ib. 4. l 6. pr.). *Cum essent mihi et tibi fundi duo communes Titianus et Seianus et in diuisione conuenisset, ut mihi Titianus, tibi Seianus, cederet, inuicem partes eorum tradidimus, et in tradendo dictum est ut alteri per alterum aquam ducere liceret: recte esse seruitutem impositam ait, maxime si pacto stipulatio subdita sit* (ib. 3. l 33. pr.). See l 32 below. It is however not improbable that in these passages Tribonian has substituted *traditio, tradendo* for *mancipatio, mancipando*. At least in Vat. Fr. 47 Paulus says a usufruct could not be reserved in making a delivery of a non-mancipable thing, because delivery was not an action of the civil law (Elvers, p. 706 n.). And such a change from *mancipare* to *tradere* has actually been made in D. VII. 2. l 3. § 1, as may be seen on referring to the original in Vat. Fr. 80. A similar change would account for the generality of Gaius' statement, as given in D. II. 14. l 48 *In traditionibus rerum, quodcumque pactum sit, id ualere manifestissimum est.*

(*d*) What then was the *pactio* and *stipulatio* which were used (where *in iure cessio* was not applicable) to create a usufruct or other servitude? We must distinguish two things: a bargain or stipulation to grant a servitude, and a bargain or stipulation actually granting it. It might easily occur that the precise limitations of the servitude required some investigation, but the general intention of the two parties could be at once expressed. This would be the subject of a *pactum*. If the parties or their representatives (sons or slaves) could meet, it might be confirmed by a stipulation. But such a bargain or stipulation would be preparatory to the formal constitution of the servitude; cf. D. VIII. 4. l 5. § 3 *a* where the obligation to grant a servitude is expressly distinguished from the imposition and existence of a servitude; XLV. 1. l 136. § 1. Whether such a preparatory bargain or stipulation was made or not, the constituting act would apparently be a bargain, confirmed by a stipulation, in which the one party claimed and the other promised (according to the servitude in question) *uti frui sibi* (i.e. *stipulatori*) *licere*, or *ire agere sibi heredique licere* (cf. D. XLV. 1. l 38 esp. §§ 10—12), with the limit of time, if any, and specification of the thing or piece of ground to be enjoyed or the direction of the road, or any other suitable limitations (D. VIII. 1. l 4; l 5; l 6. § 5; XLV. 1. l 115. pr., &c.). Or the form might be *neque per te* (i.e. *promissorem*) *neque per heredem tuum fieri, quominus mihi uti frui* (or *ire agere*, &c.) *recte liceat* (D. XLV. 1. l 49. §§ 1, 2; l 75. § 7. pr.). The former of these forms is apparently the more sweeping in its terms, but practically meant no more than the latter: a man could promise only for himself and his heirs, &c., not for all the world (D. XLV. 1. l 38. pr.). It was usual however to

add another clause providing for the payment by the promiser (i.e. the grantor of the servitude) of a sum of money in case the stipulator (i.e. the grantee) was disturbed in his enjoyment (*si aduersus id factum sit*, ib. l 71; l 137. § 7). What liability would thus be incurred by the promiser, would of course depend on the terms in which the condition of forfeiture was couched. In Theophil. *Inst.* II. 3. § 4 agreement, confirmatory stipulation, and penal clause all appear in the form described.

id efficere] 'effect the establishment of a usufruct'.

§ 1. **consistit**] So the inferior MSS. F has *constitit;* Steph. συνίσταται. The same mistake occurs in D. XIX. 2. l 2. pr. (Gaius), *Locatio et conductio proxima est emptioni et uenditioni, iisdemque iuris regulis constitit* (Justinian's transcript of this, *Inst.* III. 24. pr., has *consistunt*, and Gai. III. § 142 has *locatio et conductio similibus regulis constituuntur*); XIII. 6. l 1. § 2 *impuberes commodati actione non tenentur, quia nec constitit commodatum in pupilli persona sine tutoris auctoritate;* XXXVIII. 1. l 9. § 1. *Constitit* may be right in D. VIII. 3. l 13. § 1 and XLIV. 7. l 52. § 8 (but cf. § 10). Below § 3 *constitit* is in F for *constituitur*.

For the meaning, 'has legal footing', or 'existence', 'lies', 'is admissible', cf. D. VIII. 2. l 20. pr. *seruitutes, quae in superficie consistunt, possessione retinentur;* XXXII. l 40. pr. *cum in parte hereditatis fideicommissum non constiterit;* Gai. III. § 131 *in arcariis nominibus rei, non litterarum, obligatio consistit.* In some passages the meaning is rather 'consists' e.g. D. I. 2. l 2. § 12 *est proprium ius ciuile, quod sine scripto in sola prudentium interpretatione consistit;* L. 17. l 24 *quatenus cuius intersit, in facto, non in iure consistit.* Compare VII. 5. l 5. § 1 *si pecuniae sit ususfructus legatus uel aliarum rerum quae in abusu consistunt* ('allow of consumption').

in fundo et aedibus] 'in a landed estate and a town house'. *Fundus* is any land (*omne quicquid solo tenetur*, D. L. 16. l 115) which is regarded as a whole, whether small or large, or hitherto part of a larger *fundus*. It has boundaries, a mere *locus* has not. See Ulpian in D. L. 16. l 60. It may or may not be built on, and either wholly or partly (ib. l 211).

aedes was the ordinary expression for a dwelling-house (D. XXX. l 41. § 8) in a town as distinguished from *uilla* 'a country house', 'homestead' (D. L. 16. l 211).

iumentis] 'beasts of draught' (for *iug-mentum* 'a yoke beast') i.e. horses, asses, mules. Oxen are not properly comprehended under this term, but they are under *pecus* (D. XXI. 1. l 38. §§ 4—6; XXXII. l 65. § 5) or *armenta* 'plough beasts' (D. L. 16. l 89. pr.; see below note on l 68. § 2). *Pecus* (with stems *pecud-* and *pecor-*) comprehended *quadrupedes quae gregatim pascuntur*, viz. sheep, goats, oxen, horses, mules, asses and swine (D. IX. 2. l 2. § 2; XIX. 5. l 14. § 3; XXXII. l 65. § 4; Vat. Fr. 259: comp. Ulp. XIX. 1).

ceterisque rebus] 'and other things', i.e. besides slaves and yoke-beasts. Slaves are included, according to the context, under *personae* (Gai. I. 48, *quaedam personae sui iuris sunt, quaedam alieno iuri subiectae sunt*) &c., or

under *res* (Gai. II. 260, *potest quisque etiam res singulas per fideicommissum relinquere, uelut fundum, hominem, uestem, argentum, pecuniam*).

§ 2. **in uniuersum**] Used either extensively, of the whole number of cases of ownership, i.e. 'generally', 'universally' as Liv. IX. 26. § 8 *non nominatim qui Capuae, sed in uniuersum qui usquam coissent coniurassentue aduersus rempublicam, quaeri senatus iussit;* D. XLIV. 4. l 11. § 1 *in uniuersum autem haec in ea re regula sequenda est, ut dolus omnimodo puniatur:* or intensively, of the whole character and life of an ownership, i.e. 'entirely'; Gai. III. 103, *quaesitum est, si quis sibi et ei, cuius iuri subiectus non est, dari stipuletur, in quantum ualeat stipulatio: nostri praeceptores putant in uniuersum ualere* (for the whole amount); Tac. *Germ.* 5 *terra etsi aliquanto specie differt, in uniuersum tamen aut siluis horrida aut paludibus foeda* ('as a whole', 'speaking generally').

proprietates] *Proprietas* 'ownership', 'property', is opposed sometimes to *possessio*, e.g. D. IV. 3. l 33; L. 16. l 115; frequently, as here, to usufruct, e.g. Gai. II. 30.

semper abscedente u. f.] 'in consequence of the perpetual withdrawal of the use and enjoyment', cf. l 56. *Abscedere* is the opposite of *accedere:* the former denotes the loss of what belongs to a thing; the latter the addition to it from without of what did not belong to it. The ownership, when another has the usufruct, is often called *nuda proprietas*, cf. l 72.

placuit] 'it has been determined', i.e. by legal authority, without implying by what authority. *Placere* is the regular word in a decree of the senate, e.g. Cic. *Phil.* 3. § 39; 5. § 33, &c.; so of a judicial decree, *postea sententia dicta est, et placuit id...ei deberi* (D. XXXI. l 88. pr.); of lawyers' opinions, *sed quod de sponsore diximus non constat; nam diuersae scholae auctoribus placuit, nihil ad nouationem proficere sponsoris adiectionem aut detractionem* (Gai. III. 178); ib. II. 154, 178, &c.; of a decision of the emperor (D. XXXI. l 66. pr.); of a private agreement (D. XX. 1. l 1. § 3).

certis modis extingui] See title 4 of this book, and Just. II. 4. § 3. The modes by which a usufruct perishes are:

(1) Death of the usufructuary (D. VII. 4. l 3. § 3), or, if a community be the usufructuary, either its extinction (ib. l 21) or expiration of 100 years (VII. 1. l 56), whichever event happen first.

(2) *Capitis deminutio* of the usufructuary (D. VII. 4. l 1) confined by Justinian to *capitis deminutio maxima* and *media*, i.e. to loss of freedom or citizenship. (Cod. III. 33. l 16. § 2.) See note on l 25. § 2.

(3) Distinction, or total permanent change, of the object of the usufruct (L. l 5. § 2—l 12).

(4) Non-use [see below, l 5 (where see note, p. 44); l 71].

(5) Confusion or consolidation with the ownership, i.e. if the owner acquire the usufruct (e.g. by surrender from the usufructuary Gai. II. 30), or if the usufructuary acquire the ownership (D. VII. 4. ll 16, 17).

Of course a usufruct, like any other right or privilege, if granted only for a time, or till a specified event, or by a person who has only a similarly

limited right to grant, comes to an end on the arrival of the time or event in question. Paulus (*Sent.* III. 6. § 28 sqq.) applies the term *amittitur usus-fructus* to Nos. 2—5, and *finitur ususfr.* to death and expiration by lapse of time.

extingui et ad propr. reuerti] The two expressions are strictly speaking inconsistent. The former is really the most exact. The usufruct held by the usufructuary is a right of enjoyment attached to his person. On his death or loss either of freedom or of citizenship, or on failing to use, this right is extinguished and is nowhere at all. The owner of the land does not receive back the usufruct, but is no longer hindered in the exercise of his full rights as owner by another having a right to use and enjoy his land. So D. XXIII. 3. 1 78. pr. *cum in fundo mariti habens mulier usumfructum dotis causa eum marito dedit, quamuis ab ea ususfructus decesserit, maritus tamen non usumfructum habet, sed suo fundo quasi dominus utitur, consecutus per dotem plenam fundi proprietatem, non separatam usufructu,* (cf. Böcking *Pand.* § 134, Bd. II. pp. 10, 11). The return of the absent usufruct to the ownership is however a practical way of putting the matter, and is frequent, cf. D. VI. 1. 1 33; XLIII. 16. 1 10.

§ 3. **et constituitur**] So the inferior MSS.: F and the first hand of a Leipsic MS. have *constitit;* Steph. supports our reading: *οἵστισι τρόποις καὶ συνίσταται καὶ σβέννυται ὁ οὐσόφρουκτος, τοῖς αὐτοῖς καὶ οὗσος συνίσταταί τε καὶ σβέννυται.* Cf. also Just. II. 5. pr.: and below, 1 6. The perfect *constitit,* followed by the present *finitur,* does not seem suitable. *Consistit* would be a possible correction.

nudus usus] i.e. use without produce. See 7. 1 1 (Gai.) *constituitur etiam nudus usus, id est, sine fructu: qui et ipse isdem modis constitui solet quibus et ususfructus;* ib. 1 14. § 1 *ususfructus an fructus legetur, nihil interest: nam fructui et usus inest, usui fructus deest: et fructus quidem sine usu esse non potest, usus sine fructu potest.*

The lawyers had some difficulty in defining what the use without the *fructus* consisted of. The result of their discussions was that the (bare) use of a house was held to be the right of dwelling there with a person's family and dependents: the use of a country estate (*fundus*) carried besides this the right of consumption for daily use of the ordinary products, such as vegetables, fruit, flowers, wood, hay and perhaps also wine and oil; the use of cattle carried only the dung, though some thought a little milk was included: the use of a slave carried his services for the user and his family. But in no case could the user of a house, unless he resided in it also, grant or let to others the use. And in the case of a country estate the use must not interfere with the regular operations of the farmer. See title 8, and the abridged account, not in all respects consistent with it, in Just. II. 5.

1 4. **in multis casibus**] Just as we say 'in many cases'. Cf. D. I. 1 37, *inspiciendum est quo iure ciuitas retro in eiusmodi casibus usa fuisset,* and below, 1 33. § 1; 1 64.

pars dominii est et exstat] 'is part of the ownership and appears

separately'. The position of a usufructuary in comparison with the owner's position is peculiar, and naturally gave rise to different modes of expression according to the circumstances. A usufructuary had the exclusive possession (physically) of the thing and the exclusive right to take and consume its produce. These were rights of ownership exerciseable by him or his nominees, and the owner could no longer exercise them. Hence the grant of a usufruct might be considered as the severance from the ownership of those rights, and thus we get such expressions as *deducto usufructo proprietas legari potest* (cf. l 6. § 2, &c.), and *ususfructus amissus ad proprietatem recurrit* (Paul. *Sent.* III. 6. § 28). In some lights therefore a usufruct (*a*) may be called a part of the ownership (as here and cf. D. XXXI. l 76. § 2 (Papin.) *fructus portionis instar optinet*): and (*b*) in some matters is treated as such; e.g. a bargain not to sue for an estate was a good plea to an action on the same title for the usufruct (D. II. 14. l 27. § 8); a stipulation for an estate included the usufruct of the estate (*similis est ei qui totum, deinde partem stipulatur*, XLV. 1. l 58); one bound to make over an estate could give a surety bound only for the usufruct (XLVI. 1. l 70. § 2); a bequest of an estate could be diminished by the usufruct being withdrawn (XXXIII. 4. l 2. § 1); in all which cases the analogy of a part, not of a servitude, is followed: and (*c*) the usufructuary was sometimes included under the term *dominus* (XLII. 5. l 8. pr.). On the other hand a usufructuary was in other respects very different from an owner: he had not the legal possession; he had no power of consuming the substance, nor of creating servitudes, nor of alienating his right, nor even of transmitting it to his heir. The owner had all these rights, as well as those exerciseable by the fructuary, inherent in his ownership, and only partially and temporarily dormant in consequence of the grant made to a stranger of the use and produce. And therefore in many respects usufruct was not part of the ownership. Thus (*a*) l 33 (Papin.) *usumfructum in quibusdam casibus non partis effectum optinere conuenit;* XXXI. l 66. § 6 (Papin.) *ususfructus in iure, non in parte, consistit;* L. 16. l 25. pr. (Paul.) *recte dicimus eum fundum totum nostrum esse, etiam cum ususfructus alienus est, quia ususfructus non dominii pars sed seruitus (seruitutis F.) sit, ut uia et iter; nec falso dici totum meum esse, cuius non potest ulla pars dici alterius esse;* and (*b*) a formal release of the usufruct by one to whom the estate itself was due was invalid, because the usufruct was not a part (D. XLVI. 4. l 13. § 2); and (*c*) the usufructuary was constantly opposed to the *dominus*, and sometimes expressly excluded from the name (XXIX. 5. l 1. § 2; XLVII. 2. l 43. § 12). Gaius states and does not decide the question whether *ususfructus pars rei sit an proprium quiddam* (D. XLVI. 1. l 70. § 2). See Cujac. *in lib.* XVII. *Quaest. Papin. ad* l 33. h. t. *usumfructum;* Böcking *Pand.* § 134. n. 24 (vol. II. p. 10); Windscheid *Pand.* § 200.

exstat] This word has occasioned much trouble. Brisson, Dirksen, Heumann and the German translator all take it as equivalent to *constat*. Cujac. refers to D. VII. 2. § 3 as giving the same context with *constat:*

posse enim usumfructum ex die legari et in diem constat. Fuchs (*Krit. Stud.* p. 21) proposes to substitute *constat* in the text. Steph. also seems to have taken it so. *ἐπὶ πολλῶν ὁ οὐσούφρουκτος μέρος δεσποτείας γνωρίζεται, καὶ τοῦτο ἐντεῦθεν δείκνυται τε καὶ δηλοῦται, ὅτι, ὥσπερ ἡ δεσπότεια καὶ πούρως* (pure) *καὶ ὑπὸ ἡμέραν δύναται δίδοσθαι, τὸν αὐτὸν τρόπον καὶ ὁ οὐσούφρουκτος δύναται καὶ πούρως καὶ ἀπὸ φανερᾶς ἡμέρας συνίστασθαι* (though it is possible that *γνωρίζεται* 'is recognised as separate' may be meant for *exstat*). But there is no other instance of *exstat*=*constat* 'it is certain', and the construction after *constat* is an accusative with infinitive (e.g. D. IX. 4. l 21. § 1; XXIV. 3. l 24. pr. § 5; XXVI. 5. l 5; 7. l 9. § 8; XLI. 3. l 44. § 1) not *quod*. It would be grammatical, but would involve an unusual sense of *exstat*, if we translated: 'it is a striking fact, that it can be given either immediately or from a future time'. I think the ordinary meaning of *exstat* may be given to it here: 'is to the fore', is to be found, 'is not merged and undiscoverable'; cf. D. XLII. 6. l 1. § 12 *sciendum est, post-eaquam bona hereditaria bonis heredis mixta sunt, non posse impetrari separationem: confusis enim bonis et unitis separatio impetrari non poterit. Quid ergo si praedia extent, uel mancipia uel pecora uel aliud quod separari potest? hic utique impetrari poterit separatio,* XIII. 7. l 22. § 2, *a praedone fructus et uindicari extantes possunt et consumpti condici;* and below 9. l 1; IX. 4. l 21. § 5. Or it may mean 'comes to the fore', 'comes to be', e.g. XII. 6. l 18 *si ea condicione debetur, quae omnimodo exstatura est;* XXXIII. 4. l 11; XXXV. 2. l 48 *cum emptor uenditori heres exstitit.*

The main difficulty in this way of taking the passage lies in the insufficiency of the reason appended by Paulus (*quod uel*, &c.). But I assume that the passage of Paulus has been altered (see next note), and that we have only part of his reasoning. It would improve the text if *est et* were struck out as a misreading of *exstat*.

uel praesens uel ex die dari potest] 'It can be given so as to take effect either immediately or from a future day.' In the Vatican fragments (§ 48—50) we have extracts from Paulus' *Manualia*, where he says that a usufruct from a future day could be established by bequest (see infr. l 54; l 72) but that whether it could be established by surrender in court or mancipation or adjudication was very doubtful. Probably Tribonian has altered our passage, which naturally would have contained some such doubts. (So also Huschke on Vat. Fr. l. c.)

l 5. A usufruct is divisible, and this is shewn in five instances. It may be created in part; may be lost in part; may be reduced by the operation of the lex Falcidia, which assigned the heir a fourth part; the obligation to grant it devolves upon the heirs of the promiser according to their respective shares in the promiser's inheritance; and a part-owner of an estate is liable to the usufructuary only in proportion to his share in the estate. Cf. Cujac. ad loc. (IV. p. 760).

et] The first *et* belongs to *constitui* and corresponds to the second *et* which belongs to *amitti*.

ab initio] 'originally', 'at the creation of the usufruct', as opposed to any subsequent modification. So D. XVI. 3. l 24 (Papin.); XXXV. 2. l 51; l 73. § 5; &c. Cf. infr. l. 26. In D. XLIX. 1. l 19, it means 'anew'; in D. XXVIII. 6. l 43. § 2; XXXV. 2. l 1. § 8, 'at the commencement' of the words of institution or bequest. Gaius often has *etatim ab initio* in our sense II. 123; 148; IV. 172; 173, and D. XXXV. 2. l 76. § 1; l 78, &c.

pro parte indiuisa uel diuisa] 'in undivided or in divided parts of a thing', or, as it is sometimes said 'in ideal or material parts'; i.e. a usufruct may be divided between several persons; e.g. A to have $\frac{1}{2}$, B to have $\frac{1}{3}$; C to have $\frac{1}{6}$; or A may have the (whole) usufruct in that part of an estate which lies on the right bank of the river; B the (whole) usufruct on the part lying on the left bank. The same contrast of different modes of division is referred to in D. VII. 4. l 25, *placet uel certae partis uel pro indiuiso usumfructum non utendo omitti;* XXXI. l 66. § 2 *plures in uno fundo dominium iuris intellectu, non diuisione corporis optinent;* XLV. 3. l 5. pr. *seruus communis sic omnium est non quasi singulorum totus, sed pro partibus utique indiuisis, ut intellectu magis partes habeant quam corpore;* L. 16. l 25. § 1 *Q. Mucius ait partis appellatione rem pro indiuiso significari: nam quod pro diuiso nostrum sit, id non partem sed totum esse: Seruius non ineleganter partis appellatione utrumque significari;* XIII. 6. l 5 fin. For examples of divided usufruct see l 49; 2. l 1; l 4, &c. A *real* servitude was not itself divisible, though there might be a servitude to or in a definite part of an estate: *Per partes seruitus imponi non potest, sed nec adquiri. Plane si diuisit fundum regionibus, et sic partem tradidit pro diuiso, potest alterutri seruitutem imponere, quia non est pars fundi sed fundus* (D. VIII. 4. l 6. § 1; cf. 3. l 32; 1. l 6; l 17). The contrast between usufruct and other servitudes is seen in the case of a formal release (*acceptilatio*) of part of the one and of the other. The release of part of a usufruct was valid; of part of a right of road was null (D. XLVI. 4. l 13. § 1, cf. XXXV. 2. l 80. § 1; l 81). A use could not be divided, *nam frui quidem per parte possumus, uti pro parte non possumus* (D. VII. 8. l 19).

legitimo tempore amitti] 'to be lost in (i.e. by non-use for) the statutable period', e.g. by not taking his share of the fruits, or by not taking the fruits from his part of the estate. Paul. *Sent.* III. 6. § 30 *non utendo amittitur ususfructus, si possessione fundi biennio fructuarius non utatur, uel rei mobilis anno.* These short periods were enlarged by Justinian, and the distinction between moveables and immoveables abolished, the same period being required to give a plea of prescription against a claim of usufruct, as was required to give a plea against a claim of ownership (Cod. III. 33. l 16. § 1). This period was ten years *inter praesentes*, i.e. if claimant and possessor were domiciled in the same province; twenty years *inter absentes*, i.e. if they were domiciled in different provinces (Cod. III. 34. l 13; VII. 33. l 12). In the case of absence

for part of the ten years, the number of years of absence had to be added to the ten years; i.e. if a man was domiciled in the same province for only six years, the period required would be 10+(10−6), i.e. 14 years (Justin. *Nov.* 119. § 8). The three years' period prescribed for acquiring the *ownership* of moveables (Cod. VII. 31. § 2) did not apply to the loss of servitudes; cf. Unterholzner *Verjährungslehre*, § 223.

similiter] i.e. *pro parte indiuisa uel diuisa.* So also *eadem ratione.*

per legem Falcidiam] The lex Falcidia was proposed by Pub. Falcidius trib. pl. 714 A.U.C. (Dion Cass. XLVIII. 33). It was intended to prevent the property of an inheritance being so given away in legacies that the heir would be unwilling to enter. It declared that every Roman citizen might give what legacies he willed and to whom he willed, but with this proviso, that at least a fourth of the whole of this inheritance should be taken by the heirs under the will (Gai. II. 227; D. XXXV. 2. l 1). The value of the estate was taken as it stood at the time of the death. Any accretions or losses between that time and the time of entry were not reckoned; they were an additional benefit or burden to the heir only (l. 30; l 73). If the total amount of the legacies exceeded in value three-fourths of the inheritance, all legatees had to abate proportionally. The heir could make the abatement on paying the legacy, or, if there was uncertainty whether any, and if so what, abatement would be required, he could pay the legacies in full, taking security for repayment of the excess (3. l 1. pr.). Anything the heir received otherwise than as heir was not regarded in computing the fourth. Thus a legacy under the will to the heir, or anything paid him by a legatee as the condition of his being entitled to the legacy, or by a slave as the condition of obtaining his freedom, was not reckoned in the heir's fourth (l 76; l 91). If there were several heirs, the legacies charged on each heir's share had to be reduced so as to leave him a fourth at least, (not of the inheritance but) of his share of the inheritance: and an heir who was not charged with any legacies did not have his share diminished in consequence of other heirs being overcharged (l 77). The value of the inheritance was usually estimated by an arbiter (3. l 1. § 6); moderate funeral expenses, all debts, and the value of all slaves manumitted by the will, were deducted from the value of the inheritance before the fourth was calculated (2. l 1. § 19; *Inst.* II. 22. § 3). The provisions of the lex Falcidia were extended to trusts by the Sc. Pegasianum (Gai. II. 254), and to trusts on an intestacy by Antoninus Pius (l 18. pr.); and was applied in practice to gifts in view of death (*mortis causa donationes*, XXXIX. 6. l 27).

If a usufruct of some property was bequeathed and in consequence of the lex Falcidia an abatement had to take place, a fourth of the usufruct was retained by the heir (D. XXXV. 2. l 1. § 9). But in order to ascertain the total value of the legacies a valuation had to be made. A

scale shewing, according to the age of the usufructuary, a certain number of years' purchase was given by Ulpian; a somewhat different scale was stated by Macer to be in use (ib. l 68; see below note on l 29), and apparently the abatement required by the lex Falcidia was sometimes made by the heir receiving from the legatee a fourth of the value so estimated (cf. ib. l 1. § 9; l 80. § 1; l 81). See below, note on *sociis* p. 47.

reo promittendi] *Qui stipulatur, reus stipulandi dicitur; qui promittit, reus promittendi habetur* (D. XLV. 2. l 1). The older form had the ablative (*reus stipulando*). Festus, p. 273, has *Reus nunc dicitur qui causam dicit, et item qui quid promisit spoponditue ac debet; at Gallus Aelius, libro* II. *significationum uerborum quae ad ius pertinent, ait, reus est qui cum altero litem contestatam habet, siue is egit siue cum eo actum est. Reus stipulando est idem qui stipulator dicitur, quippe suo nomine ab altero quid stipulatus est: non is qui alteri adstipulatus est. Reus promittendo est, qui suo nomine alteri quid promisit, (non) qui pro altero quid promisit.* Festus adds, though the precise words are not certain, that in the second of the XII. tables (*si quid horum fuit uitium, iudici arbitroue reoue eo dies diffensus esto*) the word is used both of plaintiff and defendant. It does not seem necessary there to refer it to more than the defendant, though practice may have extended the application of the law. Cicero says, *Orat.* II. 43. § 183, *reos appello non eos modo qui arguuntur, sed omnis quorum de re disceptatur: sic enim olim loquebantur:* and § 321, *reos appello quorum res est.* As a matter of fact, however, except in the phrases *reus stipulandi* and *reus satis accipiendi* (D. XLVI. 3. l 34. § 8) the word always means the person charged or liable either for a criminal offence (so commonly in lay writers), or for a civil obligation, e.g. for a dowry (D. XXIII. 3. l 5. § 7; XXIV. 3. l 22. § 2), for money borrowed (XVI. 1. l 17. § 2); or for a religious obligation, as a vow (Verg. *Aen.* v. 237, cf. Cic. *Legg.* II. 16. § 41); or metaphorically, e.g. *fortunae* (Liv. VI. 24. § 8); *suae quisque partis tutandae* (Liv. XXV. 30. § 5); *desidiae* (Martial X. 7. 2), &c. In law the *reus* was the principal debtor, as distinguished from those collaterally concerned (cf. D. XLV. 2. l 6. § 3; XIII. 7. l 9. § 3, &c.). The application of the term to *stipulatores* was probably due to the convenience of lawyers, who wanted a brief term to distinguish a *stipulator* from an *adstipulator* (cf. Festus above; Gai. II. 110 sqq.), rather than to any lingering sense of the term being equally applicable (if indeed it ever was) to both parties to an obligation.

usus fr. obligatio diuiditur] 'the obligation of allowing the usufruct is divided'. The case is taken of a person who had granted a usufruct by stipulation and had died: his heirs are bound to allow the grantee to have the usufruct: and a usufruct being divisible, each heir is bound to allow it so far as his share of the inheritance goes. The principle is the same, whatever be the thing in which the usufruct was granted, whether it was the whole estate of the deceased, or an undivided part of it, or a specific farm or slave or article, &c. If the obligation were not thrown

upon several persons by inheritance, but assumed by their own promise, each would be liable for the whole, unless the contrary were expressed (D. XLV. 2. l 2; l 3. § 1).

In the case of non-divisible servitudes each heir is bound for the whole. *Ea, quae in partes diuidi non possunt, solida a singulis heredibus debentur* (D. L. 17. l 192: cf. X. 2. l 25. § 10; XXXV. 2. l 80. § 1).

si ex communi praedio debeatur] 'if the usufruct be due from an estate (i.e. if the usufruct is the usufruct of an estate), held in common by several persons'.

sociis] 'part-proprietors'. *Socius* is used sometimes in a wider sense, as here, of persons who hold property in common without any intention of forming a partnership in it, e.g. as heirs or legatees or donees in common: and sometimes in a narrower sense of those who intend to hold it on joint account (D. XVII. 2. ll 31—37; X. 3. l 2). In either case the action of one does not make the others liable to third parties, though they may be liable to contribution *inter se*. If an action be brought against one to enforce the usufruct, judgment against him affects only his share of the property.

A usufruct may be divided in several ways, either (1) by dividing the land into districts according to the shares (*ut regionibus eis uti frui (iudex) permittat*); or (2) by letting the land either to one of the usufructuaries or to a third party, and dividing the rent: or (3) if the thing concerned be a moveable, by arranging for a deposit of it with the usufructuaries in turns (D. X. 3. l 7. § 10).

restitutio] *Restituere, restitutio* are constantly used in law language, not only of restoration to a claimant of what he had before, but of giving up to him what he had a right to have. The fact of his claim being approved by the law shews that he is *out* of what is due to him, and restoration or replacement become therefore suitable expressions. *Restituere is uidetur, qui id restituit, quod habiturus esset actor si controuersia ei facta non esset* (D. L. 16. l 75; cf. l 22; l 35; l 73; l 81; l 246; VI. 1. l 13; l 17; l 20, &c.; Cic. *Caecin.* 8 § 23). So it is even used of the duty of a vendor (D. XIX. 1. l 13. § 18); of a purchaser (Cod. IV. 49. l 8. § 1); of one who has received damages for the corruption of his slave (D. XI. 3. l 14. § 9); of an agent (XVII. 1. l 8. §§ 9, 10); Savigny, *System.* § 222; Bd. v. p. 129. It is regularly used of an heir or legatee delivering property under a trust to the intended holder (infr. l 50; Gai. II. 248 sqq.; D. XXXIII. 2. l 29, &c.); and of restoration of rights of minors, absentees, and others, quasi-legally but unjustly lost—*restitutio in integrum* (D. IV. 1—6; XLII. 8). Similarly of Metellus' action on succeeding Verres in Sicily (*Verr.* II. 26). In a more literal sense it is used of restoring roads, buildings, &c. (D. XLIII. 8. l 2. § 43; 12. l 1. § 19; VII. 4. l 10. § 7, &c.).

l **6.** pr. **ut ecce**] 'as for instance'. So Gai. I. 193; D. IV. 5. l 7. pr.; XIV. 1. l 1. § 12, &c. Originally no doubt Gaius mentioned here the mode of creating a usufruct by surrender in court (Gai. II. 30).

sed et proprietas] A second way of creating a usufruct, and the reverse of the first. There the usufruct is bequeathed, and the bare ownership remains in the inheritance: here the bare ownership is bequeathed, and the usufruct remains.

deducto usu fructu] 'withdrawing' or 'reserving the usufruct'. Vat. Fr. 47 (Paulus) *Per mancipationem deduci ususfructus potest, non etiam transferri. Per 'do lego' legatum et per in iure cessionem et deduci et dari potest.* 48 *In re nec mancipi per traditionem deduci ususfructus non potest, nec in homine, si peregrino tradatur: ciuili enim actione constitui potest, non traditione quae iuris gentium est.* Cf. Gai. II. 33, and l 32 below; and the note on l 3 *et sine testamento* (p. 35).

It was essential that the reservation of the usufruct should be expressed, if the bare ownership was intended to be bequeathed. A legacy of a fundus to one and of the usufruct of the fundus to another made the two hold the usufruct jointly (D. XXXIII. 2. l 19). But this was not the effect of a similar adjudication in a suit *familiae erciscundae* (X. 2. l 16. § 1), evidently because the intention of the judge in such a case was to put an end to the joint holding (so also Donell. *Iur. Civ.* X. 6. 5).

§ 1. **adhuc**] 'moreover'. So Gai. III. 102 (where *adhuc* is evidently parallel to *item, praeterea, rursum*); 150; 180 (parallel to *praeterea*, &c.).

iudicio fam. erc.] This proceeding is usually called *iudicium*, only occasionally (and improperly?) *actio* (D. X. 1. l 1; l 2. pr.; Cod. III. 36. l 2). The reason is apparently given in D. X. 2. l 2. § 3 *In familiae erciscundae iudicio unusquisque heredum et rei et actoris partes sustinet.*

familiae] (*a*) *Familia* is a body of *famuli*, and this according to Festus is from an Oscan word *famel* meaning 'slave'. The 'family' of an ancient Roman consisted of his wife, children and slaves, who were all *in sua potestate*, i.e. under his control and at his disposal. In the course of time this original meaning split as it were into two parts, and thus the ordinary meanings of the word in classical writers are (1) the family or group of persons sprung from one stock and bearing the same name (e.g. Cic. *Mur.* 7. § 15 *sunt amplae et honestae familiae plebeiae;* Tac. *H.* I. 16 *sub Tiberio et Gaio et Claudio unius familiae quasi hereditas fuimus;* and see Ulpian's definition D. L. 16. l 195. § 2 *communi iure familiam dicimus omnium adgnatorum: nam et si patre familias mortuo singuli singulas familias habent, tamen omnes, qui sub unius potestate fuerunt, recte eiusdem familiae appellabuntur, qui ex eadem domo et gente proditi sunt*): and (2) a body of slaves (e.g. Cic. *Caecin.* 19. § 35 where commenting on the edict *unde hi aut familia aut procurator tuus* he says *non dubium est quin familiam intelligamus quae constet ex seruis pluribus, quin unus homo familia non sit;* Varr. *R. R.* I. 18. § 1 *de familia: Cato dicit haec mancipia* XIII *habenda;* Ulp. XLIII. 16. l 1. § 16 sqq. The *familia publicanorum* included all servants, whether slave or free, D. XXXIX. 4. l 1. § 5). But the earlier meaning of a whole 'household' is seen in the words *pater familias, mater familias, filius familias*, and in old formulae. The word occurs several times in

quotations from the XII. tables. Putting the most important together we have *Paterfamilias uti super familia pecuniaue* (i.e. persons or cattle) *sua legauerit, ita ius esto* (Cornif. I. 13: Ulpian XI. 14 gives *uti legassit super pecunia tutelaue suae rei, ita ius esto*). *Si intestato moritur, cui suus heres nec escit, adgnatus proximus familiam habeto. Si adgnatus nec escit, gentiles familiam habento* (Bruns p. 23, ed. 4; Schöll *Duod. tab. rell.* p. 127 sqq.). The *Lex Ualeria Horatia* had *qui tribunis plebis, aedilibus, iudicibus, decemuiris nocuisset, eius caput Ioui sacrum esset, familia ad aedem Cereris uenum iret* (Liv. III. 55. § 7). So also Liv. XLV. 40. § 7 *e filiis quos solos nominis sacrorum familiaeque heredes retinuerat domi*, probably from an old formula (Pernice *Labeo* I. p. 325). The power of disposition over the household was exercised by means of a mancipation (Gai. I. 117, 118), and this was used in one of the early forms of will; Gai. II. 103, 104 *olim familiae emptor, id est, qui a testatore familiam accipiebat mancipio, heredis locum optinebat, et ob id ei mandabat testator, quid cuique post mortem suam dari uellet: nunc uero alius heres testamento instituitur, a quo etiam legata relinquuntur, alius dicis gratia* ('for form's sake') *propter ueteris iuris imitationem familiae emptor adhibetur. Eaque res ita agitur: qui facit (testamentum), adhibitis sicut in ceteris mancipationibus v testibus ciuibus Romanis puberibus et libripende, postquam tabulas testamenti scripserit, mancipat alicui dicis gratia familiam suam: in qua re his uerbis familiae emptor utitur, 'familia pecuniaque tua endo mandatela tua custodelaque mea* (so Mommsen), *quo tu iure testamentum facere possis secundum legem publicam, hoc aere', et ut quidam adiciunt, 'aeneaque libra, esto mihi empta': deinde aere percutit libram, idque aes dat testatori uelut pretii loco*, &c. Cf. Ulpian XX. §§ 2—9. Gaius also speaks of *uendere familiam* (II. 109), *familiam uēnire* (II. 116, 119). The household included not merely the persons but also the family stock of property, and eventually was used for the property (i.e. slaves and things), exclusive of the free persons. In D. XXXVI. 1. l 15. § 7—l 17. pr. the following expressions are given as all denoting in a testamentary disposition the whole of a person's estate, *hereditas, bona, familia, pecunia, uniuersa res mea, omnia mea, patrimonium, facultates, quidquid habeo, census meus, fortunae meae, substantia mea, peculium meum, successio.* In the Bantine inscription (Bruns p. 51) and Cato *ap. Gell.* VI. (VII.) 3. § 37 *minus dimidium familiae multa esto*, it means 'property'. On the word generally see Ulpian in D. L. 16. l 195.

(*b*) In the *iudicium fam. erc.*, at least as we know it, the 'household' was only the property (*res familiaris*). It was a proceeding for dividing among coheirs (whether by will or intestacy), or others *heredum loco* (D. X. 2. l 2. pr.; l 24. § 1), all the *res hereditariae*, that is, the slaves, land or moveables belonging to the inheritance. Moneys due to or from the deceased were *ipso facto* divided among the heirs in their respective shares, and hence (by the XII. tables) did not come properly into the proceeding (l 2. § 5—l 4; Cod. II. 3. l 6; III. 36. l 6), though arrangements were sometimes made or confirmed respecting them (ib.). But it was the duty of

the judge to make a complete division (D. x. 2. l 24. § 20) and to settle all claims that the heirs might have against one another for legacies or dowries, or for expenses or liabilities incurred, or for profits accrued in respect of the inheritance or of anything belonging to it (D. x. 2 *passim*). He might divide the property in physical parts, or sell it and divide the proceeds (l 22. §§ 1, 2); he might distribute the several things among the heirs and direct one to pay to the other the excess value (l 52. § 2); or impose a servitude in favour of one on property assigned to another (l 22. § 3; x. 3. l 18). Such a servitude might be a usufruct, which is the case named in our text. If the testator had bequeathed some land and reserved the usufruct to his heirs, or if he had bequeathed a usufruct to a slave belonging to the inheritance, the judge might, if the heirs wished not to hold the usufruct in common, assign it to one absolutely or for a time or in alternate years (l 16. pr. § 2). The judge is often called *arbiter* (l 30; l 31; l 43; l 47, &c.; Paul. *Sent.* I. 18. § 1; Cic. *Caecin.* 7. § 19).

erciscundae] This word, like some others in Latin, was written and probably pronounced variously, with and without the aspirate. The oldest authority the *Lex Rubria* (A.U.C. 705—712) has *de familia erceiscunda deiuidunda iudicium* (*C. I. L.* I. 205, 55; Bruns, p. 95). The MSS. of Cicero (*Or.* I. 56. § 237; *Caecin.* 7. § 19) mainly support *herciscundae*. Gaius (II. 219; IV. 42) omits *h*. In D. x. 2, the first writer of the Florentine MS. generally omits *h*, which the corrector generally restores; the early Neapolitan palimpsest always omits *h*. Festus p. 82 and Servius (*Aen.* VIII. 642) write *erctum*. The origin of the word is obscure. The addition of *deiuidunda* in Rubrius' law has led Corssen (*Beitr. Ital. Spr.* p. 113 sq.) to assign to the word a different meaning from 'dividing' and he suggests 'marking off', and connects the root with that of *hortus* and *cohors*. Puntschart (*Civilrecht* p. 167) connects it with εἴργειν and takes it as originally 'inclose', then 'mark off', 'divide'. Gaius however (II. 219) expressly interprets *erciscunda* as *diuidunda*, and Rubrius may well have meant the same by the addition. In Cic. *Or.* I. 56. § 237 *qui quibus uerbis herctum cieri oporteat nescit, idem herciscundae familiae causam agere non potest* 'who knows not in what words a summons to divide should be made &c.' *herctum* is supine. Festus p. 82 *erctum citumque*, Gell. I. 9 *ercto non cito* are not easily explicable in the absence of the context. I suspect a mistake.

communi diuidundo] i. e. more fully *in communi diuidundo iudicio*, 'in a judicial proceeding for the division of common property'. This proceeding, doubtless of later birth than the *fam. erc. iudicium*, was applicable to obtain a division of any property held in common which was not part of a common inheritance (D. x. 3. l. 1—l. 4). The expenses, liabilities, faults and profits of the tenants in common in respect of the common property were dealt with by the judge (often called *arbiter*) who had similar powers to those exercised in the *fam. erc. iud.* (l 3. pr.; l 6. §§ 10, 11; l 7. pr. § 10 &c.). This proceeding was applicable also in the case of inheritance (XVII.

2. l 34) and in cases of regular partnership. But it differed from the regular partnership action (*pro socio*), in not being concerned with the general duties and rights of the partners, and in particular took no account of debts. But it gave real rights to the property adjudged (see next note) whereas the *actio pro socio* resulted only in obligations (ib. l. 43). Cicero alludes to this proceeding *com. diu.* in a letter to the lawyer Trebatius (*Fam.* VII. 12. § 2).

adiudicauerit] 'adjudged' i.e. 'assigned as his property'. The word is technical and is used of the judicial assignment of a thing to a suitor, especially when the effect of the judgment is not merely the declaration of an existing right, or a condemnation in damages, but the creation of a fresh title. It is chiefly found in connexion with the *iudicia finium regundorum, fam. erc.* and *com. diu.* (D. II. 1. l 11. § 2; Ulp. XIX. 6). The ordinary frame of a formula received in these suits a change, its concluding part having an *adiudicatio* (as well as a *condemnatio*), to enable the judge to assign a specific thing or part of a thing to one of the parties (Gai. IV. 42). Rudorff (*Edict.* p. 86) restores the *formula com. diu.* thus. *Iudex estó, Quod ille fundus illi et illi communis est, quam ob rem ille illum communi diuidundo prouocauit* (or *ambo communi diuidundo arbitrum sibi dari postulauerunt*), *quantum ob eam rem alteri ab altero aut Titio adiudicari oportet, id iudex alteri aut Titio adiudicato, quodque alterum alteri si non paret ob eam rem dare facere praestare oportet, ex fide bona eius iudex alterum alteri condemna: Si non paret, absoluito* (where Titius is a third party to whom the property has been sold; cf. Cod. III. 37. l 3. § 31; D. X. 3. l 7. § 13). A slightly different restoration is given by Keller *Civ. Pro.* n. 458. See also Bekker *Akt.* I. 231. A very different restoration, in my judgment not so probable, is given by O. Lenel *Edict. Perp.* p. 163: all are conjectural.

Adiudicare is used in a similar meaning in Cic. *Agr.* II. 17. § 43; *Off.* I. 10. § 33 sqq. For a somewhat different use (*adiudicatus=addictus*) see Gai. III. 189; Paul. *Sent.* II. 21. § 17; cf. Quintil. VII. 3. §§ 26, 27.

§ 2. **adquiritur autem**] Acquisition of a usufruct is opposed to the constitution of it, only as laying stress on the position of the receiver. As a usufruct is essentially connected with a particular person (D. VII. 4. l 3. § 3; Vat. Fr. 55), and endures only so long as that person endures, the constitution and acquisition are simultaneous. There is no transference of an already created usufruct.

A difficult question arises in connexion with acquisition through a slave. Is the usufruct thus acquired to be regarded as in connexion with the person of the slave or the person of the owner? Will it consequently perish on the death of the slave or on the death of the owner? If the slave is manumitted or alienated, is it retained by the former owner, or is it lost, or does it pass with the slave and become his, if he be set free, or his new master's, if he be sold? And how if the slave be the property of several persons as joint owners, or be partially alienated? It is clear from the Vatican Fragments (§§ 75, 82) and from Cod. III. 33. ll 15, 17 that there was

a good deal of discussion and doubt on some of these points among the lawyers. Although the language of Justinian is general (*per seruum acquisitus*) it can hardly be understood to relate to any but cases of inheritance or legacy or gift, not to stipulation. Where the slave stipulates, he is as it were the mere instrument of his master, and the master acquires just as though his own voice had put the question (D. XLV. 3. 1 40); the master's person would be alone regarded in the fate of the usufruct. Paul's statement (Vat. Fr. § 57) is decisively for this. And any other conclusion would be unsuited to the use of slaves as agents for corporate bodies (see note below on 1 56). But in cases of inheritance legacy or gift conflicting considerations arise. Was the testator or donor thinking of benefiting the slave or of benefiting his master? (See 1 22.) Did he contemplate the heir or legatee of the property being kept out of the usufruct for the life of the slave—a period which he could estimate—or for the life of some one unknown to whom the present owner might sell the slave, or for the life of the longest survivor of a number of joint owners of the slave? The language of Paul in Vat. Fr. 57 *ususfructus, 'do lego' seruo legatus, morte et alienatione serui perit* probably, as Mandry (*Fam. Güter-recht* I. p. 82) remarks, refers to the case of the slave's death or alienation before the legacy vested, and is therefore not of general import (compare the neighbouring fragments). Justinian relates (Cod. III. 33. 1 15) that, when there was a slave who had become partially the property of another, the usufruct acquired through him by his former (entire) owner was variously considered, either to fail altogether, or to fail proportionally, or to remain with the former owner unaffected. Justinian, following Julian's opinion, decided in favour of this last view. But, if there were some who held that even a partial alienation of the slave destroyed the usufruct, we may argue *a fortiori* that those lawyers would have held that a total alienation would destroy it (cf. Savigny *Syst.* II. p. 79; Fitting *Castr. Pec.* p. 189 n. 7). No one seems to have held that the usufruct passed, wholly or partially, to the new master.

The same question arises when a usufruct is acquired through a son *in potestate*. Justinian made a peculiar decision (Cod. III. 33 1 17.) that, when a son was emancipated or died or suffered *deminutio capitis maxima* or *media*, the father retained the usufruct, and that, if the father died or suffered *dem. cap.*, the son retained the usufruct. This decision is certainly foreign to the Roman idea of usufruct as inherent in one person.

per personas iuri nostro subiectas] Probably Gaius wrote very much what we find given from Paulus in Vat. Fr. 51 *Adquiri nobis potest ususfructus et per eos quos in potestate mancipioue habemus, sed non omnibus modis, sed legato, uel si heredibus illis institutis deducto usufructu proprietas legetur; per in iure cessionem autem uel iudicio familiae erciscundae non potest; per mancipationem ita potest, ut nos proprietatem, quae illis mancipio data sit, deducto usufructu remancipemus.* Acquisition by surrender in court was not open to a slave, because he could not claim a thing as

his own (Gai. II. 96): nor could he, while a slave, be heir, and hence could not take part in a suit for partition of an inheritance (ib. §§ 187—189). In the case of slaves as in that of others who were not *sui iuris*, the inheritance or legacy was at once acquired by their master (Gai. II. 87; D. XXIX. 2. 1 79). By mancipation a usufruct could only be reserved, and therefore must already implicitly be one's own. If it was to be acquired by mancipation through a slave, it could be only by taking a previous act of mancipation in connexion with it. Thus *A*, having an estate and desiring to give *B* the usufruct of it, mancipates the estate to *B*'s slave on the understanding that *B* should thereupon remancipate it to him, reserving the usufruct (comp. Pliny in note to l. 7. § 2 *alimenta*, p. 64). These methods are all that were available for establishing usufructs in Gaius' time, at least in Italian land.

What persons then were *nostro iuri subiecti* in Gaius's time? and in Justinian's? In two passages Gaius deals carefully with acquisition through others and in very similar words (II. 86 sq.; III. 163 sq.; cf. D. XLI. 1. 1 10). *Adquiritur autem nobis non solum per nosmet ipsos, sed etiam per eos quos in potestate manu mancipioue habemus; item per eos seruos in quibus usumfructum habemus: item per homines liberos et seruos alienos quos bona fide possidemus* (Gai. II. 86). These classes then are (1) slaves (Gai. I. 52); (2) legitimate children (ib. 55); (3) adopted children (ib. 97); (4) wives *in manu* (ib. 108); (5) women copurchased in trust (ib. 114, 115); (6) persons in formal slavery as part of the process of emancipation (ib. 116, 123, 132, 140, 141); (7) slaves of which we have the usufruct; (8) freemen possessed by us *bona fide* as slaves; (9) other persons' slaves possessed by us *bona fide*. The last three classes are apparently distinguished from *nostro iuri subiecti* in Gai. II. 95, which is copied in Inst. II. 9. § 5: and acquisition through either of the last two was limited to what was acquired *ex re nostra* (i. e. *possessoris*) *uel ex operis suis*, and thus did not include gift, inheritance, or legacy. The same rule applied to slaves of which we have only the usufruct (Gai. II. 92—94), except so far as the intentions of the testator made a difference (see below, l 21 sqq.). Still as in Gaius' time stipulations were available to establish a usufruct as regards provincial land and between foreigners, and by Justinian's legislation were available also for land in Italy, it would seem that acquisition of a usufruct (e. g. by purchase *ex re nostra*) is possible by the instrumentality of *all* the above classes. *Iuri nostro subiectas* in the text must therefore be understood either to include these three last classes as being temporarily subject to our control (cf. D. XLVI. 4. 1 11), or, if this expression excludes them, the use of it must be due to the fact that inheritance and legacy were the ordinary modes in which a usufruct was created and therefore chiefly present to the mind of the writer.

nihil autem uetat, &c.] The *autem* looks as if some words had preceded, declaring some modes of acquisition not to be available. Compare the Vat. Fr. quoted above.

The case here put is that of my slave being made heir, and a legacy of some property being charged on him in favour of some one else, the usufruct however being reserved: I become heir through him and have (*inter alia*) the reserved usufruct.

l 7. pr. **usu fructu legato**] The rights here mentioned would presumably belong to the usufructuary, however the usufruct was established, and not merely if he acquired it by bequest. Bas. speaks of the usufructuary without limitation. Comp. l 25. § 7.

omnis fructus rei] 'all the produce of the thing'. *Fructus* like many law expressions has, or may have, a different content, according to the circumstances. Besides the natural products from the soil or animals, the profits derivable from letting others have the use of our property, e.g. rents, interest of money, &c. are often treated as *fructus*. Modern writers have given these the name of *fructus ciuiles* as opposed to *fructus naturales*. The Romans said of them *uicem fructuum optinent* (D. XXII. 1. l 34); *pro fructibus accipiuntur* (ib. l 36); *in fructu numerari* (ib. l 19); *fructuum nomine computari* (VIII. 5. l 4. § 2); *loco fructuum* 3. 9 (v. 3. l 29). The question what shall be considered as *fructus* arises in the recovery of an inheritance (D. v. 3. l 27, &c.) or of real property (D. VI. 1. l 17), in the sale of the same (XXII. 1. l 25); in the restoration of a dowry (XXIV. 3. l 17); and especially in the case of usufruct. The usufructuary was entitled, besides the actual use, to all the benefit which according to the nature of the thing or the general practice could be obtained from it. If it was land, he was entitled to whatever grows or is taken there (*quicquid in fundo nascitur uel quicquid inde percipitur* (below l 9. pr.; l 59 § 1); e.g. grapes and olives; stone, chalk and sand; mines; honey; game and fish; withes, reeds; cuttings from woods (l 9; l 13. § 5). If the land or houses were let, he was entitled to the rent (l 7. § 1; l 12. § 2; l 59. § 1); if it was a ship, to the freight (l 12. § 1); if animals, to their young, their hair, wool, milk, dung, &c. (VII. 8. l 12. § 2; XXII. 1. l 28). Slaves were not regarded as merely animals, and therefore their services or the hire of them might be claimed, but their children belonged to the owner of the mother, not to the usufructuary (below, l 68). The details of the matter come in view in the course of this title.

pertinet] 'belongs to' i.e. as his own. *Pertinere* is however very wide in meaning. D. L. 16. l 181 (Pompon.) *Uerbum illud 'pertinere' latissime patet: nam et eis rebus petendis aptum est quae dominii nostri sint, et eis quas iure aliquo possideamus quamuis non sint nostri dominii: pertinere ad nos etiam ea dicimus quae in nulla eorum causa sint, sed esse possint.* For an instance of this last see below l 27. pr.

rei soli aut rei mobilis] frequently used in opposition to one another as immoveables and moveables. D. XIII. 3. l 1. pr.; XV. 1. l 7. § 4; L. 16. l 222. Moveables sometimes included animals (e.g. VI. 1. l 1. § 1 *Haec actio locum habet in omnibus rebus mobilibus tam animalibus quam his quae anima carent, et in his quae solo continentur*); sometimes was

distinguished from them (XXI. 1. l 1. § 1 *de uenditionibus rerum tam earum quae soli sint quam quae mobiles aut se mouentes*).

§ 1. **puta**] 'suppose', i. e. 'for instance', is used in post-Augustan writers both with a dependent object sentence, e. g. *puta me uitam pro uita reddidisse* (Sen. *Ben.* III. 31. § 1), and, as here, parenthetically: *eo loco, quo neque neruus neque musculus est, ut puta, in fronti* (Cels. v. 26. § 21). So below l 12. § 3; l 15. § 6; I. 7. l 34; II. 15. l 9. § 10; XLI. 4. l 2. § 12; XLV. 1. l 72. pr.: &c.

reditus] 'return', 'proceeds', 'revenue'. Cf. l 9. § 5; D. XXXIII. 2. rubr.; l 16; l 17; l 22; l 25; l 38. Colum. III. 3. § 2 *Studiosi agricolationis hoc primum docendi sunt, uberrimum esse reditum vinearum.*

obuentiones] 'payments coming in'. The word appears to be general in meaning D. XIV. 1. l 1. § 15; XXII. 1. l 34; XXVII. 9. l 5. § 9. *Obuenire* is used of offices coming to a person, e. g. D. IV. 8. l 32. § 4; *Coll. Mos.* I. 3. § 1; Suet. *Iul.* 7 *quaestori ulterior Hispania obuenit;* and frequently of inheritances or legacies falling to a person; e. g. *Lex Agrar.* 23; D. VI. 1. l 20, &c.; sometimes generally; Gai. III. 151 *Si quis in hoc renuntiauerit societati, ut obueniens aliquod lucrum solus habeat.* The *obuentiones* appear to have been accidental or occasional gains opposed to the regular rents. An example is given in the immediate context.

areis] Plots of land whether for planting (Col. v. 6. § 6), threshing (Id. II. 20. § 2), or 'building-ground not built on'. *Locus sine aedificio in urbe area, rure autem ager appellatur* (D. L. 16. l 211).

ceteris quaecumque aedium sunt] In the case of a sale the appurtenances of a house are thus described in D. XIX. 1. l 13. §§ 31—l 17 *Aedibus distractis uel legatis, ea esse aedium solemus dicere, quae quasi pars aedium uel propter aedes habentur, ut puta, putealia, lines (?) et labra, salientes. Fistulae quoque quae salientibus iunguntur, quamuis longe excurrant extra aedificium, aedium sunt; item canales. Aedium multa esse, quae aedibus affixa non sunt, ignorari non oportet, ut puta seras, claues, claustra.* What *obuentiones* could come from these is not clear, unless it were damages for their obstruction or injury. Probably the expression in our text is meant as a general expression only to cover possible circumstances, not distinctly conceived.

mitti in possessionem] There were four cases in which this order was made by the Praetor. 1. When the heir refused to give security to the legatees or persons claiming under a trust (XXXVI. 4); 2. When a widow was pregnant, and the child when born would have a claim to an inheritance (XXXVII. 9); 3. When a person has given security for his appearance to a suit, and neither appears nor is defended (XLII. 4); 4. When damage is apprehended from the ruinous condition of a neighbouring house, and the possessor refuses to give security (XXXIX. 2). In the last case the possession is only of the specific building in question, in the others it is of all the property (cf. XLII. 4. l 1). In the first two cases the step was only to keep the property safe: in the third it was sometimes preparatory to a

sale: as to the fourth see the next note. Refusal to admit into possession the person so sent subjected the offender to an action *in factum* and also to an interdict *ne uis fiat* (D. XLIII. 4).

causa damni infecti] The owner or lawful occupier of a house or land, which stood in danger of damage from the defective condition (*uitium*) of another building or other land, was allowed by the Praetor to demand security from the owner, superficiary, fructuary, pledgee, &c. of the ruinous building or land against the danger apprehended, though not yet done (*damnum infectum*). The security required was in the case of an owner his own formal promise (*repromissio*), in the case of most others, including a usufructuary (D. XXXIX. 2. 1 9. § 5) was the formal promise of others (*satis datio*) as well. If security was not given within the time fixed by the praetor, he gave the complainant the right to occupy (*in possessionem ire*) the dangerous property without however ejecting the owner (l 15). He is allowed, but is not obliged, to prop up or repair the dangerous building, &c., and is entitled to his costs (l 15. §§ 30, 31). If the owner abandons the property or still refuses to give security, the Praetor on finding sufficient ground in these or other facts (*causa cognita*), decreed the effective possession (*possidere*) to the complainant, a possession which in due time ripened into ownership (l 15. §§ 16, 21). This is compared by Ulpian to the *noxae deditio* authorised in the case of slaves who have committed torts l 7. § 1. The words of the edict are given in l 7. pr. of that title. See also *Lex Rubr.* 20 (Bruns p. 91).

The order of the words is irregular, the ablative *causa* being rarely prefixed to its genitive either in classical or in law Latin. It does so occur however in Ter. *Eun.* 202; Suet. *Aug.* 24. None of the passages in Livy, given by Klotz *Lex.* s. v., have this order, at least in Madvig's edition. See his *Emend. ad Liv.* XL. 41. § 11 (p. 474).

iure dominii poss.] 'possess as owner'. So also D. XXXIX. 2. 1 15. § 33. By the first decree he would only *in possessione esse*, i.e. have merely the custody of the house: by the second decree he would actually possess (*possidere*) with the intention of holding as owner; and after the expiration of the prescribed time (see on l 5), would gain the real ownership, cf. D. XLI. 2. 1 3. § 23 *Qui creditorem rei seruandae causa, uel quia damni infecti non caueatur, mittit in possessionem, uel uentris nomine, non possessionem sed custodiam rerum et obseruationem concedit; et ideo cum damni infecti non cauente uicino in possessionem missi sumus, si id longo tempore fiat, etiam possidere nobis et per longem possessionem capere praetor causa cognita permittit*, cf. ib. l 10. § 1. *Capere* is here equal to *in suum dominium capere* (D. XXXIX. 2. 1 5: § 1): so l 18. § 15 *qui iussu praetoris coeperat possidere et possidendo dominium capere.* After the second decree the complainant would be possessor *bona fide* and *ex iusta causa*, and would have, to protect his right, the interdict (*utile*) *de ui* and the *Publiciana actio* (ib. l 18. § 15). Under the ante-Justinian law he would have had the house, &c., *in bonis*, and by usucapion (for which Tribonian has substituted

per longam possessionem, &c.) would eventually have acquired the *dominium ex iure Quiritium*. And hence he is sometimes called *dominus*, l 15. §§ 16, 17; and spoken of as having the right of *uindicatio* (x. 3. l 7. § 9). As regards Justinian's law, most modern writers (against Cujacius and others) hold that he becomes owner at once on the second decree, and that the passages, in which gaining the ownership by continued possession is spoken of, are to be understood of those cases only in which the defendant was not owner. See Savigny *Syst.*, IV. p. 566; Vangerow, § 678. VII. 2 (Vol. III. p. 559); Burckhard in Glück h. t. § 1680, p. 556 sqq. But nothing is seen of this distinction in the Digest, and the context shews that *dominus constituitur* is not to be taken in the full sense, but only as possessor with the intention to hold as owner, and with the Praetor's protection till he becomes so. *Iulianus scribit eum, qui in possessionem damni infecti nomine mittitur, non prius incipere per longum tempus dominium capere, quam secundo decreto a praetore dominus constituatur* (l 15. § 16). This cannot surely be taken epigrammatically 'he cannot begin to gain ownership before he actually becomes owner'. If not, it shews that *dominus constituitur* means only 'is put in the owner's place'.

si perseueretur non caueri] 'if security continues not to be given'. Cf. D. XXXIX. 2. l 4. § 4, *si duretur non caueri.* The active form of *perseuerare* is also found used impersonally, D. XXXIX. 1. l 20. § 14 *et si satisdatum sit, cautum tamen non perseueret, interdictum cessat.*

caueri] *Cauere* is used generally both of taking security and of giving security. For the former cf. D. II. 15. l 3. pr. *Scriptus heres in transactione hereditatis aut cauit sibi pro oneribus hereditatis, aut, si non cauit, non debet negligentiam suam ad alienam iniuriam referre;* L. 17. l 73. § 4 *Nec paciscendo nec legem dicendo nec stipulando quisquam alteri cauere potest;* Cic. *Brut.* 5. § 18 *Tibi ego, Bruti, non soluam, nisi prius a te cauero, amplius eo nomine neminem cuius petitio sit petiturum;* &c. For the latter, which in the Digest is the more common use, cf. Tac. *A.* VI. 17 *Si debitor populo in duplum praediis cauisset;* D. II. 8. l 8. § 1 *qui mulierem adhibet ad satisdandum, non uidetur cauere;* ib. § 4 *tutor et curator, ut rem saluam fore pupillo caueant, mittendi sunt in municipium;* &c. Frequently in the passive impersonal, e.g. Cic. *Verr.* II. Lib. I. 54, § 142 *Praedibus et praediis populo cautum est.* (*Cauere* is also often used of provisions in a law, e.g. D. XXXVII. 8. l 2; Gai. II. 253; or in a will, &c., Gai. II. 181, &c.)

The methods of giving security were (1) a man's own promise in reply to a stipulation. This was often called *repromissio* (cf. D. XLVI. 5. l 1. § 6, *hi, qui suo nomine cauent, repromittunt; qui alieno, satisdant;* D. XLVI. 6. l 1. § 6), and according to Justinian (Cod. VI. 38. l 3) was to be understood where the word *cautio* occurred, unless *satisdatio* or *fideiussio* was expressly mentioned. (2) Sureties, who become bound in the same way by stipulation. This was called *satisdatio* or *fideiussio* (D. II. 8. l 1). The creditor's action in this case was *satis acceptio* (D. XLV. 1. l 5. § 3). Before Justinian there were three classes of sureties, *sponsor, fidepromissor, fideiussor;* see Gai. III.

115—127. (3) Pledges, cf. D. XL. 5. l 4. § 8 *cauendum est idonee. Quid est idonee? satisdato utique aut pignoribus datis;* ib. XIII. 7. l 9. § 3. (4) Occasionally an oath was accepted when *satisdatio* was beyond the party's means (Cod. VII. 17. l 1. § 2), or disrespectful to his dignity (Cod. XII. 1. l 17. pr.). Cf. *Inst.* IV. 11. 12. In earlier times persons who held public money or undertook public contracts gave both personal and real security, *praedibus et praediis;* see Cic. *Verr.* quoted above; Liv. XXII. 60. § 4; *Lex Agrar.* 43—48, 74 (Bruns pp. 74, 78); and especially *Lex Malac.* 60. 64, 65, which tells us the summary powers of execution. Cf. Kuntze *Excurs. zu* § 556 (p. 506, ed. 2).

nec quicquam amittere] The right to a neighbouring house or other dangerous property, acquired by the usufructuary under the second decree of the Praetor, did not lapse when the usufruct lapsed, e.g. on the death of the usufructuary: the property, thus acquired, passed to his heirs. This accession of property was regarded as a *fructus.*

hac ratione] 'on this principle', 'similarly'. Cf. l 12. § 5; l 68. pr.; Paul. *Sent.* IV. 8. § 22 *idque iure ciuili Uoconiana ratione uidetur effectum* 'on the principle of the *lex Uoconia*'; Gai. IV. 179 *qua ratione;* I. 63 *alia ratione,* &c. The principle in this case appears to be the fructuary's right to the complete and exclusive use and enjoyment of the profits of the land, of which he has the usufruct, which use and profits might be impaired or risked by alterations.

nec aedificium, &c.] 'The owner cannot raise higher the house, of which you have the usufruct, without your consent'. Nor has the usufructuary the right to do so (l 13. § 7). The question of raising another house with the effect of darkening the usufructuary's is different (below l 30). To prevent that, you must prove that the house so raised is subject to the usufructuary's house in this respect (D. VIII. 2. l 9).

nec areae, &c.] A house erected on this plot, and remaining there, so changes the character of the plot, that the usufruct is lost (D. VII. 4. l 5. § 3—l 7). The erection of a mere shed or hut (*casa*) has not this effect (below l 73). Nor does the erection of a house destroy the usufruct, if the house be removed, before the period has expired, within which non-use brings about the loss of usufruct (ib. l 71).

§ 2. **reficere**] 'to repair'. Cf. l 64; D. VII. 8. l 18. In D. XLIII. 21. 1. l 6 Ulpian commenting on the Praetor's edict *riuos specus septa reficere purgare aquae ducendae causa* &c. says *reficere est quod corruptum est in pristinum statum restaurare. Uerbo reficiendi tegere* (*tergere* conj. Mommsen), *substruere, sarcire, aedificare, item aduehere adportareque ea quae ad eandem rem opus essent, continentur;* V. l. l 76 (*respondi*) *nauem, si adeo saepe refecta esset, ut nulla tabula eadem permaneret quae non noua fuisset, nihilo minus eandem nauem esse existimari;* XXV. l. l 1. § 3; l 14; Suet. *Aug.* 30 *aedes sacras uetustate collapsas aut incendio absumptas refecit.*

per arbitrum cogi] The usufructuary is compelled by the arbitrator to repair the house of which he has the usufruct, unless he choose to relin-

quish the usufruct (l 48; l 64). The extent of the obligation to repair is defined subsequently in this fragment of Ulpian.

The action to compel him is that arising out of the stipulation which the heir had by the Praetor's edict the right to impose on the usufructuary (D. VII. 9). And the same stipulation was held to be proper (*debebit haec cautio praestari*), if the usufruct was constituted by a *donatio mortis causa* or in any other way. If it was left by way of trust, the stipulation was adapted (l 13. pr.; D. VII. 9. l 1. § 2; Cod. III. 33. l 4). The stipulation was accompanied by securities. *Usufructu legato de modo utendi cautio a fructuario solet interponi, et ideo perinde omnia se usurum ac si optimus paterfamilias uteretur, fideiussoribus oblatis, cauere cogitur* (Paul. *Sent.* III. 6. § 27). More precisely, the import of the stipulation was twofold, (1) *et usurum se boni uiri arbitratu, et, cum ususfructus ad eum pertinere desinet, restiturum quod inde exstabit;* and (2) *dolum malum abesse afuturumque esse* (D. VII. 9. l 1. pr.). The first of these two clauses is given more fully ib. § 3. *Cauere autem debet uiri boni arbitratu perceptu* (=*perceptum*) *iri usumfructum, hoc est, non deteriorem se causam ususfructus facturum ceteraque facturum quae in re sua faceret.* It was proper for heir and legatee to have evidence taken (*in testatum redigere;* cf. D. XXXII. l 39. § 1), probably reduced to writing, of the state of the thing at the commencement of the usufruct, in order to measure any alleged deterioration. The benefit of the stipulation was not exhausted by action once taken on it: it could be enforced as often as required on the occurrence of any undue use (VII. 9. l 1. §§ 4—6). The action being *ex stipulatu* was properly one *stricti iuris*, i.e. based on strict right, as opposed to an action based on equitable consideration of the circumstances (*bona fide actio*); but the content of the stipulation, requiring the measure to be applied of what a good man thought right, and including the clause *de dolo*, gave it in fact the character of a *bona fide* action. The judge is hence an arbiter. (Comp. Savigny *System* vol. v. pp. 492, 617—619.)

arbitrum] *Arbiter* according to the etymology generally accepted is from *ar*=*ad* and *betere* 'go': and hence denotes strictly 'visitor', 'witness' (Plaut. *Mil. G.* 158 *mi equidem iam arbitri uicini sunt, meae quid fiat domi;* Cornif. II. 4. § 7 *Spes celandi quae fuerit, quaeritur ex consciis arbitris adiutoribus, liberis aut seruis;* Sall. *Cat.* 20. § 1 &c.; see lexx.); and thus came to be used of those judges who were conceived as impartial bystanders. Cicero (*Mur.* 12. § 27) mocks at the jurists for not being able to tell whether *iudex* or *arbiter* was the proper word (cf. Val. Prob. p. 144 Krüger *te, Praetor, iudicem arbitrumue postulo uti des*); but in *Rosc. Com.* 4 gives the general characteristics of a judicial action before a judge and an arbiter, the former having cases where a definite thing or amount was claimed and the judge had simply to decide, aye or no, the latter having cases where an equitable decision had to be arrived at on consideration of the circumstances and of the mutual liabilities

of the parties. Hence an arbiter had jurisdiction in defining boundaries, dividing inheritances, or other common property (D. x. 1, 2, 3); examination of accounts (D. v. 1. l 53); disputes between neighbours as to raising a house (D. VIII. 2. l 11), and many other cases (Rudorff *Rechtsgeschichte* II. § 6). Obviously the question, whether a usufructuary was properly or improperly using the property and keeping the house in due repair, was a matter not to be decided on any strict construction of laws and precedents, and was therefore suited for a tribunal which would act on common sense and experience of usual business arrangements rather than on any nice knowledge of technical law. A visit to the spot would naturally in many cases be made.

cogi] *Cogere* is perpetually used of the action of a judge; e.g. *non necesse erit L. Octauio iudici cogere P. Seruilium Q. Catulo fundum restituere aut condemnare* (Cic. *Verr.* II. 12. § 31); *respondit non oportere iudicem cogere ut eum traderet* (D. VI. 1. l 58); *saepe etiam inuitus auctor fieri a praetore cogitur* (Gai. I. 190); D. XL. 5. l 24. § 12 sqq., &c.

h. t. ut sarta tecta habeat] 'only however to this extent, that he keep the property mended and covered'. *Sarta tecta* is an old technical expression for 'in good repair'. The earliest instance extant is in a metaphorical sense in Plaut. *Trin.* 317 *sarta tecta tua praecepta usque habui mea modestia.* So Cic. *Fam.* XIII. 50 *hoc mihi da atque largire ut M'. Curium sartum et tectum, ut aiunt, ab omnique incommodo detrimento molestia sincerum integrumque conserues.* The phrase is chiefly found applied to public buildings: Cic. *Verr.* I. 50. § 131 *Quaesiuit quis aedem Castoris sartam tectam deberet tradere;* and again, *monumentum quamuis sartum tectum integrumque esset;* D. I. 16. l 7. § 1 (Ulp.) *aedes sacras et opera publica circumire (debet proconsul) inspiciendi gratia, an sarta tectaque sint uel an aliqua refectione indigeant.* Hence *sarta tecta tueri* is to look after the repairs of public buildings; *exigere*, to examine or approve the repairs: Cic. *Verr.* I. 49. § 128 *In sartis tectis uero quemadmodum se gesserit, quid ego dicam?* ib. 50. § 130; *Fam.* XIII. 11. § 1; Liv. XXIX. 37. § 2 *sarta tecta acriter et cum summa fide exegerunt (censores).*; XLII. 3. § 7 Madv.; XLV. 15. § 9; D. VII. 8. l 18 *Si domus usus legatus sit sine fructu, communis refectio est rei in sartis tectis tam heredis quam usuarii;* XLVIII. 11. l 7. § 2; Cod. Just. III. 33. l 7 (anno 243) *eum, ad quem ususfructus pertinet, sarta tecta suis sumptibus praestare debere explorati iuris est;* Cod. Theod. XIV. 6. l 3; Charisius, p. 220, ed. Keil; Festus, pp. 229, 322.

The proper meaning of *sarcire* is clearly 'to make up a breach', 'mend', 'make good'; Plaut. *Most.* 147 *Ita tigna umide haec putent; non uideor mihi sarcire posse aedis meas quin totae perpetuae ruant; Epid.* 455; Cato *R. R.* 23; 31 of mending baskets; and 39 of casks; Varr. *L. L.* VI. § 64 of clothes; *Lex Quintia ap.* Frontin. *Aquaed.* 129 *Quicumque post hanc legem rogatam riuos specus fornices fistulas...aquarum publicarum, quae ad urbem ducunt, sciens dolo malo forauerit ruperit...*

peioraue fecerit,...id omne sarcire reficere restituere aedificare ponere et celere demolire damnas esto; D. XLIII. 21. l 1. § 6. A metaphorical use is found in Gell. XI. 18, who says the XII. tables *impubem praetoris arbitratu uerberari uoluerunt noxiamque de iis factam sarciri;* D. XXXV. 2. l 23; Paul. *Sent.* II. 31. § 7. See Mommsen *Staatsrecht* II. pp. 443, 444 ed. 2; Sell *de rupitiis sarciendis*, p. 8.

corruissent] 'had fallen down'. Cf. Cic. *Att.* XIV. 9. § 1 *tabernae mihi duae corruerunt reliquaeque rimas agunt, itaque non solum inquilini sed mures etiam migrauerunt;* D. XXXIX. 2. l 44. pr. Also of ground sinking, D. XIX. 2. l 15. § 2; l 33. On this matter see Cic. *Top.* 3. § 15 *si aedes eae corruerunt uitiumue fecerunt, quarum ususfructus legatus est, heres restituere non debet nec reficere, non magis quam seruum restituere, si is, cuius ususfructus legatus esset, deperisset.*

passurum] 'The heir will (have to) allow the fructuary to use it'. (The German translator takes it quite wrongly, '*so muss der Niessbraucher ihm den Gebrauch verstatten*').

de modo sarta tecta habendi] 'of the mode of keeping in repair'; i.e. of the nature and amount of repairs which he is bound to do. Cf. D. VIII. 5. l 6. § 2 *Etiam de seruitute, quae oneris ferendi causa imposita erit, actio nobis competit, ut et onera ferat et aedificia reficiat ad eum modum qui seruitute imposita comprehensus est*, i.e. to the extent implied by the nature of the servitude. The obligation was to keep the thing in the state it was when he received it, and this involves due repair: but if the building was so bad that it fell of itself (without any negligence on the part of the usufructuary), rebuilding would put it into a far better state, and that is not part of the usufructuary's duty. If the buildings are only incidental to the estate of which the fructuary has the use, he would continue to use the estate; if the building is itself that of which he has the use, the use dies with the extinction of the building (D. VII. 4. l 5. § 2). The case put just above of the heir rebuilding and still allowing the fructuary to enjoy, is clearly applicable only where the buildings are not themselves the sole object of the usufruct, and where consequently the usufruct does not die with the building. The ambiguity of *reficere* ('repairing' or 'rebuilding') has led to a corruption of the text of D. XXXIX. 2. l 20, where *non pertinet* is true if rebuilding is meant by *refectio*, and the Florentine MS. and Bas. contain the negative. But *eius ipsius* seems to require a duty of the fructuary, and therefore Mommsen is right in proposing to omit *non* (cf. Glück, IX. p. 254).

si quae—cogitur] i.e. 'the measure of the fructuary's duty to repair becomes an important question if he is not obliged to rebuild what has fallen from age. What then is he bound to do?' (*Si...cogitur* is not a dependent question 'asks whether he is compellable'.)

ad eum pertinet] 'belongs to him', in this case, as burden; more usually the word is used of benefits, e.g. l 9 *passim*. See note on *pertinet*, p. 54. In the present use cf. l 27. § 3.

quoniam] As the usufructuary is liable to other burdens, there is nothing strange in supposing him to be liable to the duty of repairs.

adgnoscit] 'the usufructuary acknowledges', i.e. 'accepts', 'has to bear'. Cf. l 50; D. II. 14. l 42 *Inter debitorem et creditorem conuenerat ut creditor onus tributi praedii pignerati non adgnosceret;* X. 4. l 11. § 1; XXVIII. 5. l 35. § 1 *Refert Papinianus pro hereditariis partibus eos adgnoscere aes alienum debere;* XXXIV. 1. l 15. pr., &c. So, of the Crown (*fiscus*) accepting a forfeiture, *bona adgnoscit* D. XXX. l 50. § 2; XL. 5. l 4. § 17; of a legatee accepting a legacy (D. XXX. l 81. § 1); of a town accepting the *bonorum possessio* (XXXVII. 1. l 3. § 4).

usu fructu legato] This is added probably to emphasize the case of a usufructuary (cf. l 52) as distinguished from one who had the use only. The latter would not have to bear such burdens, or, at any rate, not by himself (D. VII. 8. l 18).

stipendium uel tributum] *Stipendium* was originally the pay of the soldiers; *tributum* was a tax imposed for the purpose of raising money for this pay (Liv. IV. 59 fin.; 60). And the same meaning of the words is applied to Carthage in Liv. XXXIII. 47. § 2, and in the speech of Cerialis to the Treviri, by Tac. *H.* IV. 74 *neque quies gentium sine armis, neque arma sine stipendiis, neque stipendia sine tributis haberi queunt.* On the conquest of a province a tax was imposed to defray the charges of the war, and thus both terms came to be applied to taxes levied on the provincials, the principal tax being one on the land, whether in the nature of tithe or of a fixed sum. Cf. Suet. *Iul.* 25 *Galliam in prouinciae formam redegit, eique... in singulos annos stipendii nomine imposuit,* D. L. 16. l 27. § 1. The terms *stipendium* and *tributum* then differed only according to the administrative position of the province, i.e. as under the senate or under the emperor. Cf. Gai. II. 21 *Stipendiaria praedia sunt ea quae in his prouinciis sunt quae propriae populi Romani esse intelleguntur; tributaria sunt ea quae in his prouinciis sunt quae propriae Caesaris esse creduntur;* Frontin. p. 36, ed. Lachm. See Marquardt *Staatsverwaltung* II. pp. 157, 178, 189, &c.; Mommsen *Staatsrecht* II. 961; Madvig *Verfassung* II. p. 387 sqq. The Vatican fragments speak of *praedium stipendiarium* (§ 259); *stip. uel tributarium* (§ 289); *res tributaria* (§ 315); cf. ib. §§ 61, 285; Cod. Theod. VII. 20. l 8.

With our passage cf. D. XXV. 1. l 13 *neque stipendium neque tributum ob dotalem fundum praestita exigere uir a muliere potest, onus enim fructuum haec impendia sunt.* The *tributum* is often mentioned in the Digest, e.g. II. 14. l 52. § 2; XXX. l 39. § 5; XXXIII. 2. l 32. § 9; XXXIX. 4. l 1. § 1; XLVIII. 18. l 1. § 20. Respecting the returns of property on which the tax was founded, and the mode of collection, see D. L. 15. l 4; l 5; l 8. § 7. Respecting the obligation of the usufructuary to this and similar imposts see below l 27. § 3; l 52; XXXIII. 2. l 28. Arrears of taxes remained as a charge on the estate even though confiscated and sold by the Crown (D. XLIX. 14. l 36), but when an estate was bequeathed the heir was re-

quired to defray them (XXX. l 39. § 5, quoted in next note); and presumably the same rule would apply to the bequest of a usufruct.

solarium] The MSS. have *salarium*. Bas. has *ὁ τὴν χρῆσιν ἔχων τῶν καρπῶν δίδωσι τὰ δημόσια καὶ τὰ δαπανήματα καὶ τὰς ἐκ τοῦ πράγματος ἐπιθείσας διατροφάς*, whence Mommsen concludes that the Greeks read *salarium* and understood by it the payment of the farmer; which seems probable. But we do not find *salarium* used in this sense. Originally it was 'salt money', i.e. an allowance to soldiers and other public servants to buy salt (comp. English 'pin-money'). Hence it was applied to any customary payment, e.g. Tac. *Agr.* 42 *salarium proconsulare solitum afferri et quibusdam a se ipso concessum Agricolae non dedit;* D. I. 22. l 4: or salary, e.g. D. L. 9. l 4. § 2 *si salarium alicui decuriones decreuerint...ob liberalem artem uel ob medicinam: ob has enim causas licet constitui salaria;* XVII. 2. l 52. § 8 *stipendia ceteraque salaria in commune redigi iudicio societatis (ait Papinianus).* Thus in lieu of a charge for *alimenta* there was sometimes given a fixed annual payment, which is called *salarium*, D. II. 15. l 8. § 23 *si in annos singulos certa quantitas alicui fuerit relicta homini honestioris loci uelut salarium annuum uel ususfructus;* XXXIII. 1. l 19. § 2; cf. XXXIV. 1. l 16. § 1. If *salarium* were the right reading in our passage, it would mean a salary charged on a particular estate, just as *alimenta* were sometimes charged, but could hardly mean the ordinary wages of a husbandman or steward.

But *solarium* ('a ground-rent') is suggested by Mommsen, and is doubtless what Ulpian wrote. Cf. D. XXX. l 39. § 5 (Ulp.) *Heres cogitur legati praedii soluere uectigal praeteritum uel tributum uel solarium uel cloacarium uel pro aquae forma;* XX. 4. l 15; XLIII. 8. l 2. § 17; Inscr. ap. Bruns pp. 222, 223 (=Wilmanns No. 2840) *Petimus igitur aream adsignari ei iubeatis, praestaturo secundum exemplum ceterorum solarium.*

alimenta] Mention is often made of testators providing in their will for the support of their freedmen. See D. XXXIV. 1. Under *alimenta* were included food, clothing and lodging (ib. l 6). Where the amount was not specified by the testator, the measure was the latest practice of the testator himself, regard being had to the affection borne to the freedman by the testator (l 14. § 2; l 22. pr.). The period for which the support was given was often for life: and, in the case of children, till the age of puberty, i.e. according to a constitution of Hadrian, to the 18th year for boys, to the 14th for girls. And these periods were held to be intended, if nothing specific was prescribed by the testator (l 14. pr.; § 1). M. Antoninus forbad any commutation of such allowances except with the Praetor's approval, if the commutation had the effect of substituting for a periodical allowance a sum paid once for all (D. II. 15. l 8. pr.; § 6); but any suitable arrangements for altering the place or time or mode of payment were valid (ib. l 8. § 6; § 24).

Permanent endowments for such purposes were sometimes created. The emperors Nerva and Trajan commenced, and other emperors con-

tinued, the practice of securing in different parts of Italy funds for the sustentation of freeborn children. This was part of the imperial policy begun by Augustus for keeping up the numbers of Roman citizens. Two long inscriptions are preserved, giving the details of the investment of capital in land for this purpose: one in the neighbourhood of Beneventum of the year 101 A.D., the other near Veleia in Cisalpine Gaul of 103 A.D. The latter records an investment of 1,044,000 sesterces (nearly £11,000[1]) at 5 per cent. (cf. D. XXXIV. 1. l 15. pr.; l 16. § 2), the interest to be applied in the support of 245 *legitimi* at 16 sesterces per month each (=nearly 40*s.* a year), and 34 *legitimae* at 12 sesterces per month each (=nearly 30*s.* a year), besides one *spurius* at 12 sesterces and one *spuria* at 10 sesterces. In the other inscription the interest is reckoned at 2½ per cent.[2] Some private persons, amongst others Pliny the Younger, A.D. 97, at Como, founded similar charities. One at Terracina provided for 100 boys at 5 denarii per month each, and 100 girls at 4 denarii (=50*s.* and 40*s.* per year each). Three modes of securing such endowments are found: (*a*) a gift or legacy of money or land to a community (e.g. *municipium*), with instructions to pay from the yearly proceeds the cost of the *alimenta* or the sums fixed (Wilmanns *Inscr.* 2846, 2847); (*b*) the purchase of rent-charges on private estates, local or municipal officers collecting and distributing the proceeds: this was the method adopted by Trajan; (*c*) the grant to a community of a rent-charge out of land belonging to the founder. The last is the plan adopted by Pliny, whose letter (*Epist.* VII. 18) is worth transcribing, *Deliberas mecum quemadmodum pecunia, quam municipibus nostris in epulum obtulisti, post te quoque salua sit. Honesta consultatio, non expedita sententia. Numeres reipublicae summam? Uerendum est ne dilabatur. Des agros? ut publici, neglegentur. Equidem nihil commodius inuenio quam quod ipse feci. Nam pro quingentis milibus nummum, quae in alimenta ingenuorum ingenuarumque promiseram, agrum ex meis longe pluris actori publico* (town clerk) *mancipaui: eundem uectigali inposito recepi, tricena milia annua daturus* (interest at 6 per cent.). *Per hoc enim et reipublicae sors in tuto, nec reditus incertus, et ager ipse propter id, quod uectigal large supercurrit, semper dominum a quo exerceatur inueniet. Nec ignoro me plus aliquanto, quam donasse uideor, erogauisse, cum pulcherrimi agri pretium necessitas uectigalis infregerit. Sed oportet priuatis utilitatibus publicas, mortalibus aeternas anteferre, multoque diligentius muneri suo consulere quam facultatibus.* For the method of 'standing charged with the rent' compare note on l 6. § 2 *per personas*, &c. On the subject generally see Wilmanns *Inscr.* No. 2844—2848; Bruns Pt. 2. XI. 1. 2; Marquardt *Staatsverw.* II. 137 sqq.; Mommsen *Corp. I. L.* IX. p. 129.

[1] I take (as an approximate value) the aureus at 21*s.*, denarius at 10*d.*, sesterce at 2½*d.* Hultsch gives the *aureus* at 7.25 thalers, Mommsen at 6.8 thalers (Hultsch *Metrol.* p. 239).

[2] Mommsen suggests that this was half-yearly interest.

ab ea re relicta] 'left by will payable from (i. e. charged on) that property'. On the origin of this use of *relinquere* see n. on l 9. § 3 *relinquatur* (p. 71). The preposition *ab* is regularly used of the person charged with a legacy: e. g. below l 13. pr. *a quibus relictus;* l 36. § 2; Cic. *Top.* 4. § 21 *paterfamilias uxori ancillarum usum fructum legauit a filio, neque a secundo herede legauit;* Gai. II. 271 *a legatario legari non potest; sed fideicommissum legari potest. Quinetiam ab eo quoque, cui per fideicommissum relinquimus, rursus alii per fideicommissum relinquere possumus.* So also of a banker &c. on whom an order to pay is drawn; Cic. Att. VII. 18. § 4 *Quintus frater laborat, ut tibi quod debet ab Egnatio soluat.*

In the present case the charitable trust is charged on the estate, and the usufruct has been granted subject to this. In other cases a usufruct was bequeathed, and a charge for *alimenta* imposed on the usufructuary, which therefore lasted no longer than the usufructuary's life (D. XXXIV. 1. l 20. § 2). In others again a usufruct itself was granted to the freedmen for their support (below l 57. § 1; cf. D. II. 15. l 8. § 23; XXXIV. 1. l 4. pr.).

§ 3. **adserere arbores**] 'to plant trees, i.e. for the vines to cling to'. The regular meaning of *adserere* is 'to plant near', e. g. of trees near vines (Catull. 61. 106); of vines near trees, Cato *R. R.* 32. § 2 *arbores facito uti bene maritae sint uitesque uti satis multae adserantur;* Varr. *R. R.* I. 16. § 6 *uitis adsita ad olus;* ib. 26; Hor. *Ep.* II. § 170 *qua populus adsita certis limitibus* 'planted close to defined balks'. Bas. has *κεντρίζει τὰ δένδρα* which is, I suppose, 'puts a graft into the trees'. Mommsen's inferior MSS. have *subserere* (cf. l 13. § 2), i.e. 'to plant in place of decayed trees'. And so the German translator 'nachpflanzen'. The duty of the fructuary to keep up a nursery is spoken of lower down (l 9. § 6); so also to supply trees in place of those that have died (l 13. § 2; 18; *Inst.* II. 1. § 38; cf. below l 68. § 2 sqq.), but not in place of those blown down (l 59. pr.). But the present passage may well be taken in the proper sense of *adserere*, as such conduct is analogous to *modica refectio;* and this seems to be the sense of *quemadmodum* &c. The Greek translations and inferior MSS. shew a misunderstanding of a somewhat technical expression.

arbores] is either a general term including vines, reeds, &c. so Pliny *N. H.* XVII. cf. §§ 9, 222; XII. § 4; or, more usually, denotes forest and fruit trees and the like. It is often opposed to vines e.g. Cato *R. R.* 32 *Uineas arboresque mature face incipias putare;* Varr. *R. R.* I. 2. § 6 *Non arboribus consita Italia est, ut tota pomarium uideatur? An Phrygia magis uitibus cooperta?* Columella *de arbor.* 1. § 2 says expressly *ex surculo uel arbor procedit, ut olea, ficus, pinus; uel frutex, ut uiolae, rosae, arundines; uel tertium quiddam quod neque arborem neque fruticem proprie dixerimus, sicuti est uitis.* Cf. Col. *R. R.* III. 1. § 2; v. 6. § 1; 10. § 2 *Terra, quae uitibus apta est, etiam arboribus est utilis;* Ulp. D. XXV. 1. l 3 *uel si uites propagauerit uel arbores curauerit;* XVIII. 1. l 80. pr. *uites et arbores.* The XII. tables forbade cutting down *trees;* Plin. XVII. § 7 *fuit et arborum cura legibus priscis, cautumque est XII tabulis ut, qui iniuria cecidisset alienas,*

lueret in singulas aeris XXV. Gaius IV. § 11 speaks of the XII. tables giving the right of bringing an action *de arboribus succisis*, and of the fatal mistake in pleading made by one who brought an action for his vines having been cut down, and used the word *uites* instead of *arbores*. *Arbor* being often used to denote that to which a *uitis* was trained, a lawyer might very naturally hold that the XII. tables did not apply. But subsequent lawyers held that an action might be brought, either because they considered *arbor* to include *uitis* as a matter of language, or because they thought cutting down vines was within the mischief and should be within the remedy. Cf. D. XLVII. 7, esp. l 2 *Sciendum est eos, qui arbores et maxime uites ceciderint, etiam tamquam latrones puniri;* ib. l 3; XLIII. 27. l 1. § 3 *Uitem arboris appellatione contineri plerique ueterum existimauerunt.*

non posse...prohiberi] Having spoken of the usufructuary's *obligation* to repair, Ulpian turns to his *right* to repair. Cf. D. XXXIX. 2. l 18. § 2 (quoted below on l 9. § 7 *facultatem*).

nec arare aut colere] *colere* includes *arare*, as indeed according to Cato its principal part (Plin. XVIII. § 174). It denotes all farming and gardening operations, but did not properly include pasture or stock-keeping, except for manure; Varr. *R. R.* II. praef.; Col. *R. R.* I. § 25.

necessarias refectiones] The distinction between necessary repairs and ornamental improvements is one which appears in other legal relations; e. g. necessary expenses incurred by a husband on the dowry property may, unless quite of an ordinary character, be deducted by him on restoration of the dowry. Other expenses, whether belonging to the class of useful or to that of pleasurable expenses, are in a different position (D. XXV. 1). As examples of necessary expenses in the case of a dowry, are given throwing out moles into the sea, or the erection of a bakery or granary (in some cases), the repair of a ruinous house, if useful to the wife, the restoration of olive plantations, propagation of vines, care of trees, construction of suitable nursery-grounds, cure of slaves in illness, giving security against apprehended damage (ib. ll 1—3; ll 12, 14, 15). Paulus defines *necessary* expenses to be those which prevent the property from perishing or deteriorating; *useful*, those which make it better in point of productive power; *pleasurable*, those which adorn, without increasing its produce (D. L. 16. l 79). Some such question arises also in the case of expenditure on property in pledge (D. XIII. 7. l 8); expenditure by an agent (D. XV. 3. l 3. § 4; XVII. 1. l 10. § 9); or by a brother on property common to himself and a brother who is a minor (D. III. 5. l 26. pr.).

uoluptatis causa] Paul (D. L. 16. l 79) gives as instances of these in the case of a dowry *uiridia* ('shrubberies &c.', cf. Plin. *Ep.* V. 6. § 7; Vitruv. V. 9. § 5; D. VIII. 1. l 15; 2. l 12; below l 13. § 4) *et aquae salientes* ('fountains', D. XXXIII. 7. l 12. § 24); *incrustationes* ('slabs of marble' below l 13. § 7; XIX. 1. l 17. § 3, or 'moulded terra cotta figures' Plin. XXXV. § 154, let into the walls), *loricationes* ('coatings of cement'? cf.

Vitruv. VII. 1. § 4; II. 8. § 18); *picturae* ('pictures on the walls' below l 13. § 7).

tectoria] 'plasterings', i.e. the smooth coating which was given to walls and ceiling, and usually painted or coloured, cf. Vitruv. VII. 3. § 5 sqq. We must not take *facere* with it, but understand *reficere.* For to plaster what is rough is more than a usufructuary has a right to do (l 44); he may only repair.

pauimenta] 'pavements', i.e. tessellated, or mosaic, &c. Cf. Vitruv. VII. 1; Plin. XXXVI. § 184 sqq.; Marquardt *Priv. Alt.* p. 607 foll.

l 8. **quamuis melius repositurus sit**] 'although he purpose replacing it with something better'. He must not change the character of the house even though he improve it; but improvements of a minor character may be made. It is difficult to draw the line between what is forbidden here, and what is allowed in l 13. §§ 4, 7. Circumstances in the particular case would really decide.

l 9. pr. **quidquid in fundo nascitur**, &c.] The same double definition occurs in l 59. § 1 (Paulus). The two parts supplement one another. *Nascitur* might confine fruits to animal or vegetable products (though the term is used of islands, § 4, and *renascitur* of marble, D. XXIV. 7. l 13; so also *nasci* commonly in Pliny); and *percipi potest*, besides being in itself more general, directs attention to the essential condition of the usufructuary's right. For produce (except the young of animals D. XXI. 1. l. 28. pr.; below l 69; l 70. § 4) only becomes his by his own act: *Fructus fructuarii non fiunt, antequam ab eo perciperentur, ad bonae fidei autem possessorem pertinent, quoquo modo a solo separati fuerunt* (D. XXII. 1. l 25. § 1; below l 12. § 5). *Percipere, perceptio* are the technical words for gathering (fruit), getting into possession, &c., e.g. of getting in a vintage (D. XXIV. 3. l 7. § 2); of a creditor getting payment of a portion of his debt (D. XIII. 7. l 22. pr.); of an agent receiving interest due to his principal (D. III. 5. l 19. § 4); of freedmen getting allowances for food and clothing from the heir (D. XXXIV. 1. l 4. pr.), &c. On the question what amounts to gathering see D. VII. 4. l 13; VI. 1. l 78.

ipsius fructus est] Who or what is *ipsius?* Is *fructus* genitive or nominative? I incline to translate 'is produce of the farm'. But other translations are possible, e.g. 'is of (i.e. included under) actual produce'; or 'is fruit belonging to him (i.e. usufructuary)'. For *fructus* as genitive cf. D. XXII. 1. l 26. The meaning is much the same, however the words be taken. The last translation is favoured by Bas. ἀναγκάζεται ὁ τὴν χρῆσιν ἔχων καὶ γεωργεῖν τὸν ἀγρόν· αὐτῷ γὰρ διαφέρει τὰ ἐν αὐτῷ γινόμενα καὶ τὰ ἐξ αὐτοῦ δυνάμενα λαμβάνεσθαι, where I take the first αὐτῷ to be the fructuary. (Steph. and the other scholiasts are lost here.)

sic tamen ut b. u. arb. fruatur] 'with the limitation however that he must take the produce in the way a good man would think right'.

boni uiri arbitratu] This expression is frequently used as a standard of proper conduct or fair judgment. It does not strictly mean 'subject to

a good man's arbitration', but 'as a good man would judge fit'. The bond to be given by the usufructuary contained it (quoted above on l 7. § 2 *reficere*). Cf. D. III. 3. ll 77, 78 *omnis qui defenditur, boni uiri arbitratu defendendus est. Et ideo non potest uideri boni uiri arbitratu litem defendere is, qui actorem frustrando efficiat, ne ad exitum controuersia deducatur;* XVIII. 1. l 7. pr.; XIX. 2. l 24. pr. *Si in lege locationis comprehensum sit, ut arbitratu domini opus adprobetur, perinde habetur ac si uiri boni arbitrium comprehensum fuisset; idemque seruatur, si alterius cuiuslibet arbitrium comprehensum sit: nam fides bona exigit ut arbitrium tale praestetur, quale uiro bono conuenit;* XXVI. 7. l 47. § 1; XLVII. 10. l 17. § 5 (of punishing a slave) *ait praetor 'arbitratu iudicis': utique quasi uiri boni, ut ille modum uerberum imponat;* l 17. § 22. Compensation for any damage done by or to contractors for picking olives &c. was according to Cato's *formulae* to be made *uiri boni arbitratu* Cato *R. R.* 144, 145, 149. The mode of applying such a standard is often of course subjecting the matter to the arbitration of a good man. Cf. D. XVII. 2. ll 76—78; XL. 5. l 47. § 2; and Voigt *Ius naturale*, I. pp. 608 foll.

recte colere] *recte* is very common in the law-writers, and means 'duly', 'in accordance with right', legally considered. Thus *recte agere*, 'to have good right of action'; *a Maeuio non recte petitur* (D. XLV. 1. l 116), 'an action does not lie against Maevius'; *recte soluere* (D. XLVI. 3. ll 106, 108) 'to make a legally good payment'; *uia recte constituta*, 'a right of road duly created'; *recte exheredari*, 'to be duly disinherited', i.e. the disinheritance is valid; *recte dicit* is right in saying; i.e. lays down good law. So in formal covenants; Ulpian says, *Haec uerba in stipulatione posita 'eam rem recte restitui' fructus continent: recte enim uerbum pro uiri boni arbitrio est* (D. L. 16. l 73), i.e. when a man stipulates for the due restitution of a thing, the stipulation carries with it not only the thing but the fruits, i.e. all that *fairly* belongs to it (cf. D. VI. 1. l 20). *Uiri boni arbitrio* is in effect only an expansion of *recte*. Cf. below l 13. § 8 *non recte nec ex boni uiri arbitratu facturum, si* &c. with a reference doubtless to the usufructuary's bond; Cato *R. R.* 145 *oleam faciundam hac lege oportet locare: facito recte arbitratu domini aut custodis qui id negotium curabit...si quid redemptoris opera domino damni datum erit, uiri boni arbitratu deducetur; ib.* 149. § 2; Varr. *R. R.* II. 2. § 6 *Emtor stipulatur prisca formula sic: 'illasce oues, qua de re agitur, sanas recte esse, uti pecus ouillum quod recte sanum est, extra luscam surdam minam (id est, uentre glabro), neque de pecore morboso esse, habereque recte licere, haec sic recte fieri spondesne?* Corn. I. 13. § 23 *testamentum ipso praesente conscribunt, testes recte adfuerunt.* Cic. *Top.* 4. § 21 *Pugnat enim recte accipere et inuitum reddere.* In a purchase-deed from a Transylvanian wax tablet (*Corp. I. L.* III. 959; Bruns p. 207), in case of eviction *quominus emptorem uti frui habere possidereque recte liceat* (i.e. preventing the purchaser from being allowed duly to use, enjoy, have, and possess), the purchaser stipulates *tantam pecuniam probam recte dari*, i.e. for so much good money to be duly given i.e. given in such

way as the law requires. See other deeds in Bruns pp. 202, 206, 208, &c., in some of which *recte* is denoted, like other words of common form, by its initial (*R*) only. So *R. R.* for *recte recipitur*, 'reservation is duly made' (Val. Prob. p. 146 Krüger's ed.); *R. R. P.* for *rebus recte praestari* (ib. p. 147).

This last covenant (*R. R. P.*) is several times mentioned in the Digest in the form *his rebus recte praestari* (VI. 1. l 19; XXI. 1. ll 21, 22; L. 16. l 71); where we have either (*a*) an antique use of *praestare* as intransitive with *his rebus* as a dative, 'that a guaranty is given for these things', or (*b*) *his rebus* is ablative, 'on these accounts liabilities be duly made good', 'in these respects a guaranty is duly given' (comp. *eâ re, quâ re*, &c.). Huschke (*Pandektenkritik* p. 44) translates *dass dafür das Erforderliche geleistet werden soll.* So in Varro's formula *illosce boues sanos esse noxisque praestari*, 'that these oxen are sound, and that a guaranty is given for any damage they have done' (Varr. *R. R.* II. 5. § 11: also II. 4. § 5). But the ablative is harsh, and the former explanation is more probable. The same meaning is expressed in D. VI. 1. l 58 *si quid ob eam rem datum esset, id recte praestari.* So in the common form: e.g. *Haec sic recte dari fieri praestarique, stipulatus est Licinius, spopondit Irene* (Bruns p. 202: cf. 201, 210).

§ 1. **si apes in eo fundo sint]** This does not refer to a chance settlement of bees on the estate, as in D. XLI. 1. l 5. § 2 (Gaius), but to hives of bees regularly kept on the estate. Bee-culture was a usual part of farming. See Varr. *R. R.* III. 16; Verg. *Georg.* IV.; Colum. IX. 2 sqq. So bees were reckoned in a legacy as part of the *instrumentum fundi, si reditus ex melle constat* (D. XXXIII. 7. l 10).

§ 2. **lapidicinas]** See below l 13. § 5 where the right of the fructuary to open new stone quarries is treated, and affirmed, if such opening is consistent with proper management of the estate. The same question arises in the case of a dowry estate (*fundus dotalis*). The husband is entitled to cut stone in quarries already opened (D. XXIV. 3. l 8), and, even where he has himself opened them, can claim all stone cut and lying on the place at the time of a divorce. Whether he could also claim reimbursement of his expenses was a disputed point, the later opinion being that he could, if the quarry was a continuing source of profit (XXIII. 5. l 18. pr.; XXIV. 3. l 7. § 13). D. XXIII. 3. l 32 relates to stone which from special circumstances was not *in fructu.*

As to the form of the word, theory is clear for *lapicidinae*, the omission of the final letter (or syllable) of the stem *lapid-* being supported by analogy (e.g. *homi-cidium* for *homini-cidium*, *uene-ficium* for *ueneni-ficium uulni-ficus* for *uulneri-ficus*, *foedi-fragus* for *foederi-fragus*) and being less likely to conceal the derivation of the word than the omission of *d* from *caedere*, which would leave only one consonant of the verbal root. *Lapicidinae* is found in Plaut. *Capt.* 944 (without variation in MSS.); Varr. *R. R.* I. 2. § 23. In inscriptions: *lapicaedinis Lex Metall. Vipasc.* 48 (ap. Bruns p. 144); and *Inscr.* 2774 Wilm.; *lapicidinis* ap. Wilm. 2771 not. 6;

lapicidinarius 1376 Wilm. But *lapidicinae*, Cic. *Div.* I. 13. § 23 (except in Cod. V. *a secunda manu*); Plin. XXXVI. §§ 14, 15, 125, 168 (in all or the best of Detlefsen's MSS.); Paul. Diac. p. 118, ed. Müller; and in all the passages of the Digest (see above; also XXVII. 9. l 3. § 6; XVIII. 1. l 77. The grammarian Consentius (v. p. 391 Keil) speaks of both forms as right. *Lapicida* (Varr. *L. L.* VIII. § 62; Plin. *H. N.* III. § 30; VII. § 195) confirms the propriety of the spelling *lapicidina*.

cretifodinas] 'chalk quarries'. Cf. D. XIX. 5. l 16. pr. Chalk was used for various purposes; in its natural state, for manure (Varr. I. 7. § 8); and burnt to lime (l 12. pr.), for mortar (Cato *R. R.* 14, 15; Vitr. II. 5). Chalk was also used for whitening clothes (Plin. XXXV. § 196); and *creta figularis* (also called *argilla*, 'china clay') for pottery (Col. III. 11. § 9).

harenas] Sand was especially used for mortar (Vitruv. II. 4). The right of taking sand and other materials was sometimes imposed as a servitude in favour of neighbouring estates (D. VIII. 3. l 6. § 1; cf. l 5).

quasi bonum patrem familias] *quasi* is often used as a mere conjunction joining like parts of a sentence. See my *Gram.* § 1583; 1021 *a*; and for the use of the accusative (*patrem*), rather than a fresh sentence, compare § 1269. For the meaning of *quasi* see below l 13. § 3 and § 8.

This comparison is a mode of expressing 'rightly', 'properly', similar to *boni uiri arbitratu* (above l 9. pr.). Compare the terms of the bond to be given by the usufructuary (D. VII. 9. l 1. § 3, quoted above on l 7. § 2) with Paul. *Sent.* III. 6. § 27 *usufructu legato, de modo utendi cautio a fructuario solet interponi, et ideo, perinde omnia se usurum, ac si optimus paterfamilias uteretur, fideiussoribus oblatis cauere cogitur.* So below l 65 *debet enim omne quod diligens paterfamilias in sua domo et ipse facere.* Cf. Colum. IX. 1. § 6 *Contentus non debet esse diligens paterfamilias cibis quos suapte natura terra gignit. Paterfamilias* legally was anyone who was not in *potestate alterius* whether he had or had not children, and whether of full age or not (D. L. 16. l 195. § 2). Hence it was used of anyone who had independent authority either over persons or things. See below l 13. § 5.

§ 3. **sed si**] Mommsen suggests '*sed et si*'. The omission of '*et*' after *set* (or *sed*) is possible enough; but it is not necessary to alter the text. A condition may be an extreme case without a writer always denoting it as such. Cf. D. XIX. 1. l 1. § 1 (where Haloander would insert *et*); XLV. 1. l 83. § 6, where Mommsen again suggests the insertion. For the general law in this matter, see note on § 2 *lapidicinas* (p. 69).

metalla] includes mines and quarries, and is also applied to the ore and stone extracted. Varr. *R. R.* 1, 2. § 22 *ac magis putem pertinere (ad agriculturam), figlinas quemadmodum exerceri oporteat quam argenti fodinas, aut alia et alia metalla, quae sine dubio in aliquo agro fiunt* (where *alia et alia* is used in reference to the old derivation of *metalla*, cf. Plin. XXXIII. § 96 *ubicunque una inuenta uena est, non procul inuenitur alia...unde metalla* [μετ' ἄλλα] *Graeci uidentur dixisse*). Cf. *infr.* l 13. § 5 *proinde uenas quoque lapidicinarum et huiusmodi metallorum inquirere poterit.* It

is used of the mines, Liv. XLV. 29. § 11; Plin. XXXIII. *passim;* Cod. Theod. X. 19. l 1; of the ore Plin. XXXIII. § 59. Condemnation to work in the mines was a frequent punishment of criminals, D. XLVIII. 13. l 8. § 1; 19. l 8. §§ 4—12.

inuenta] 'discovered' commonly applied to finders of treasures, e.g. D. XLI. 1. l 63. pr.; XXIV. 3. l 7. § 12. So of finding stone-quarries, &c. ib. § 13.

cum totius agri, &c.] The bequest being a bequest of the usufruct of the land without limitation, it will cover unknown as well as known produce.

relinquatur] 'left by will'. This use of *relinquere* is common and arises naturally from its proper meaning of 'leave behind'. A man on death leaves behind his children and his property: he leaves behind his property *for* his children or for others according to the rules of law. As the law gives him the right of willing who should enjoy it, *relinquere alicui* comes to be understood as equivalent to *dare alicui testamento*. Comp. Plaut. *Aul.* 951 *Is quoniam moritur, ita auido ingenio fuit, numquam indicare id filio uoluit suo, inopemque optauit potius eum relinquere quam eum thesaurum conmostraret filio. Agri reliquit ei non magnum modum. Relinquere* is used of inheritances, e.g. Gai. III. 70 *si cum liberis suis etiam extraneum heredem patronus reliquerit;* D. II. 14. l 40. § 3 *heredibus testamento relictis;* of legacies, e.g. Gai. II. 197, &c., and of giving by will freedoms (D. XL. 4. l 41. § 2), and releases (D. XXXIV. 3. l 3. § 3), but especially in describing *fideicommissa*, probably because neither *instituere* (*heredem*), nor *dare* (*testamento*), nor *legare* were suitable. See Gai. II. 262—264, 269—274; Paul. *Sent.* IV. 1. But *relinquo* was not a good technical word to create a *fideicommissum* (Paul. *Sent.* IV. 1. § 6).

§ 4. **huic uicinus tractatus est**] The question raised about the right of a usufructuary to the produce of mines discovered after his usufruct commenced, is one of the same nature as that of his right when the estate receives an accretion by the action of a river, &c. *Huic* is the question just treated; *tractatus*, that going to be mentioned.

uicinus] 'resembling', 'analogous'. Cf. D. XIX. 4. l 2 *Aristo ait, quoniam permutatio uicina esset emptioni*, &c.

in eo quod accessit] 'in the case of an accessory'. A common use of the preposition, e.g. D. II. 14. l 27. § 2 *idem dicemus et in bonae fidei contractibus.*

Accedere, accessio, are used in the law-writers frequently of such appurtenances or accessories as share the legal fate of their principal (*accessio cedit principali*). It is especially used to include accessions from without, as distinguished from growths. The heading of D. XXII. 1 is *de usuris et fructibus et causis et omnibus accessionibus et mora.* Such accretions are buildings erected on land, trees planted, gradual deposits on a river bank (as here), writing on paper, the gold setting of a jewel, embroidery on dresses (D. VI. 1. l 23; Gai. II. 70 sqq.). But not only such secondary

objects as are in physical connexion with a thing (to which class of appurtenances modern lawyers would confine the term in its strictest use, e.g. Wächter *Pand.* § 65; Böcking *Pand.* §§ 78, 81) are called accessories, but even such as the terms of a bargain or the intention of a testator may have made accessory (D. XXI. 1. l 1. § 1; l 32; l 33; XXX. l 63 &c.; XVIII. 1. l 34. pr.). The use of these words in reckoning the length of time necessary for usucapion (D. XLIV. 3. ll 14—16), and in speaking of sureties (Gai. III. 126) is not here relevant. In Cato, *R. R.* 144—146, and Cic. *Verr.* III. 32, 36, 49, 50 and others, *accessio* is used of an 'additional' payment or commission.

alluuionis] The meaning of *alluuio* is given clearly by Gai. II. 70 *Sed et id, quod per alluuionem nobis adicitur, eodem iure* (i.e. *iure gentium*) *nostrum fit: per alluuionem autem id uidetur adici, quod ita paulatim flumen agro nostro adicit, ut aestimare non possimus quantum quoquo momento temporis adiciatur.* The question was mooted whether if a river had gradually encroached on one bank and left some accretions on the other, the owner of the land encroached on could not claim the accretions, as if they had been simply moved by the river from one side to the other. But it was answered, All we know is some particles were washed off, some particles were washed on, but it is not possible to identify the one with the other (Frontin. *de controu. agr.* p. 50, ed. Lachm.). It was competent to each riparian owner to secure his own bank, provided he neither impeded navigation nor unfairly altered the set of the stream, D. XLIII. 12. l 1. § 16; 13. § 6; 15; Hygin. p. 124; Sic. Flac. p. 150 (Grom. ed. Lachmann). When the land in question was *ager limitatus*, i.e. land publicly surveyed and set out by bounds, the extent of land belonging to each person was defined by the bounds, and accretions beyond these bounds did not belong to these persons, but were open to be seized by the first occupant or to be claimed by the state (D. XLI. 1. l 16; cf. XLIII. 12. l 1. §§ 6, 7, and see Rudorff *Grom. Inst.* p. 452). Such accretions were so unstable, that Theodosius directed that they should be entered separately in the census and not subjected to taxes (Theod. *Nov.* II. 20, also in Grom. p. 273, ed. Lachm.). The rights to islands created by the river changing its course, or to a river-bed left dry, or to land bodily moved by a violent mountain-torrent, or to land temporarily covered by an inundation are all different from the case of alluvion. The Nile and the rivers of North Italy, especially the Po, often led to these questions being raised. (Cf. Frontin. p. 50; Hygin. p. 124; and Theod. *Nov.* quoted above.)

Godefroi sees in our passage a correction of Paul. *Sent.* III. 6. § 22 *Accessio ab alluuione ad fructuarium fundum* (omit *fundum* with Krüger, or read *fundi* with Huschke), *quia fructus fundi non est, non pertinet.* But that relates to the property in the *alluuio*, our passage to the usufruct of it.

si insula in flumine nata sit] According to Gaius (D. XLI. 1. l 7. § 3) this was a frequent occurrence. See also of same title l 29; l 30; l 56; l 65.

§§ 1—3. The case here treated of is the third of those named in l 30. § 2. *Tribus modis insula in flumine fit, uno, cum agrum qui aluei non fuit amnis circumfluit; altero, cum locum qui aluei esset siccum relinquit et circumfluere coepit; tertio, cum paulatim colluendo locum eminentem supra alueum fecit et eum alluendo auxit.* The law assigned such an island to those, whether one or more, who owned the opposite banks if the island was in the centre, but if not, then to the owner or owners of the nearer bank, and in proportion to the length of opposite bank owned by each (ib. l 29). A floating island not cohering to the bottom of the river was regarded as part of the river and therefore public (ib. l 65. § 2).

esse enim ueluti proprium fundum] 'for it forms, Pegasus thinks, a kind of special estate', is not a part of another estate but an estate in itself. For this use of *proprium* cf. Julian in D. XLI. 4. l 7. § 1 *Si fundum Cornelianum pro emptore longa possessione capiam, et partem ex uicini fundo ei adiciam,...partes quae emptioni fundi (emptione fundo?) adiciuntur propriam ac separatam condicionem habent, et ideo possessionem quoque earum separatim nancisci oportet.*

ueluti] 'as it were' is here used simply to qualify a somewhat too strong expression. Cf. Gai. I. 111 *Quae enim ueluti annua possessione usucapiebatur, in familiam uiri transibat;* so also *uelut*, D. v. 5. l 1 *Quos praetor uelut heredes facit, hoc est, quibus bonorum possessio data est.* Gai. II. 104 *Aere percutit libram idque aes dat testatori uelut pretii loco.* So frequently *quasi*, cf. l 13. § 3. (Another frequent use of *ueluti* or *uelut* is 'as for instance', e.g. Gai. I. 114, &c.)

non est sine ratione] 'there is reason in this view'. What is added (as by *alluuio*) so gradually that its addition is not to be perceived or dated, may properly be considered part of the natural growth of the property over which the usufructuary has rights: but what in its very origin is quite separate cannot be regarded as a product, or as included in the original creation of the right.

nam] Instead of giving the principle of the distinction, a statement of the law is given embodying the principle on which it is based.

latet] The MSS. have *latitet*, apparently without variation. But the mood is wrong, and inconsistent with *apparet* as well as with its apodosis *augetur;* and the word *latitare* appears elsewhere to be used only of purposed concealment, 'keeping out of the way', e.g. D. II. 4. l 19; III. 3. l 21; XL. 5. l 1; l 28. § 1; XLII. 4. l 2. § 2; l 7. § 4, &c.; Gai. III. 78; on the other hand Justinian *Inst.* II. 1. § 20 has *est autem alluuio incrementum latens;* and *latet* is both a suitable word and accounts for the final syllable in the MS. *latitet*. I scarcely think any justification can be obtained for *latitet* from Gaius' words, II. 70 *Ita paulatim adicitur ut oculos nostros fallat.*

et usus f. augetur] 'the usufruct also is increased', i.e. as well as the *proprietas*.

fructuario non accedit] 'it is not an accretion for the benefit of the usufructuary'. Just above we have the abstract right put in the dative, *proprietati accedat.* The meaning is the same.

§ 5. **aucupiorum et uenationum reditum**] 'the returns from fowling and hunting', i.e. the profits of them. Paul. *Sent.* III. 6. § 22. The game itself is wild and the property of him who catches it, whether he have an interest in the land or not; though a stranger may of course be prevented from trespassing for this as for any other purpose (D. XLI. 1. l 3). But the facilities which the estate may have for catching game are part of the usufruct, and, if they lead to profit, the profit for the time belongs to the usufructuary. Some estates had staffs of fowlers and hunters regularly kept. Cf. D. XXXIII. 7. l 12. §§ 12, 13; ib. l 22.

§ 6. **seminarii**] 'a nursery bed'. Cf. D. XXV. 1. l 3 *Si (uir in praedio dotali) uites propagauerit uel arbores curauerit uel seminaria pro utilitate agri fecerit, necessarias impensas fecisse uidebatur,* XLVII. 7. l 3. § 4; Cato *R. R.* 46; 48. § 1. They were used for vines (Col. IV. 16. § 1; called also *uitiarium,* Cato *R. R.* 40. § 1; 47; Col. III. 4. § 1; Plin. XVII. 164); for olives (Varr. *R. R.* I. 47; Col. V. 9. § 1); figs (Varr. ib.); elms, beeches &c. (Col. V. 6. § 1; § 5). The produce of this, as well as of other parts of the estate, belongs to the fructuary. The produce would be either fruit itself or young plants or cuttings.

ita ut] The MSS. have *ita tamen ut.* Mommsen suggests the omission of *tamen.* It may easily have come here from the last syllable of *ita,* or from the *debet tamen* shortly after, but is not appropriate here, where the nature of the right is given, not a restriction as in l 7. § 2 *hactenus tamen ut;* l 9. pr. *sic tamen ut.*

seminare] The Lexx. give only the meaning of 'sow', referring to Col. II. 4. § 4; § 11; 8. § 1, § 4, where grain is spoken of. But it is also used of planting (V. 10. § 2); and *semen* is quite general. Cf. Cato *R. R.* 46; Varr. *R. R.* I. 39. § 3 where four kinds of *semina* are named, seeds, quick-sets, cuttings, and grafts; Col. V. 5. § 6 *De qualitate seminum inter auctores non conuenit. Alii malleolo protinus conseri uineam melius existimant, alii uiuiradice,* &c. The produce of a nursery would naturally be used rather for planting, &c. than for sowing.

paratum] 'ready at hand'. Col. V. 5. § 1 *Qui uolet frequens et dispositum arbustum paribus spatiis fructuosumque habere, operam dabit ne emortuis arboribus rarescat, ac primam quamque senio aut tempestate afflictam submoueat, et inuicem nouellam sobolem substituat. Id autem facile consequi poterit, si ulmorum seminarium paratum habuerit.* For *paratus* cf. Plin. *Ep.* II. 17. § 25 *Quocumque loco moueris humum, obuius et paratus humor occurrit.*

quasi instrumentum agri] 'as a kind of stock or working-plant of the land'. The *instrumentum fundi* is that with which it is *instructus* 'furnished'. It is defined (for a legacy) by Ulpian after Sabinus, *In instrumento fundi*

ea esse quae fructus quaerendi cogendi conseruandi gratia parata sunt (D. XXXIII. 7. l 8. pr.). It consisted of three classes of objects, slaves, animals, implements; called by some *instrumenti genus uocale, semiuocale, mutum* (Varr. *R. R.* I. 17. § 1). Thus it comprised the slaves employed on the estate, their wives and families; the plough-oxen and the herds kept to make manure; farming-implements, presses, vats; if there are pastures, the sheep and shepherds; if hunting and fowling, the hunters, fowlers, dogs and nets; also beasts of draught, carts, boats, casks, employed to export the produce; and though many wished to confine the term to the more permanent things (*apparatus rerum diutius mansurarum*), others e.g. Servius and Ulpian, included wine and corn prepared for the labourers, and seed for sowing (D. XXIII. l 8.—l 12. § 15; Paul. *Sent.* III. 6. § 34 sqq.). Things attached to the ground, as reed-beds, withy-beds, trees for stakes, were not comprised in the *instrumentum fundi* because they were part of the *fundus* itself (ib. l 12. § 11). Hence in our passage the nursery-beds are called *quasi instrumentum*. The term *fundus instructus* in a legacy was eventually held to be somewhat wider than *fundus cum instrumento* (l 12. § 27; l 5).

ut—restituatur] The usufructuary must keep the nurseries standing, so that on the expiration of the usufruct they may be there for the owner. The usufructuary has only the use and produce and is bound to renew.

§ 7. **instrumenti fructum habere debet**] A legacy of an estate did not carry with it the working-plant, unless this was expressed, e.g. *fundum cum instrumento*, or *fundum et instrumentum*, or (a still larger term) *fundum instructum*, or (still larger term), *ut optimus maximusque est*, or *uti possedi* (D. XXXIII. 10. l 14; 7. l 5; l 12. § 27; l 20. § 9; l 22. Paulus *Sent.* III. 6. § 34 appears either to be in some way mutilated, or to represent a divergent opinion. Cf. Huschke *ad loc.*). A legacy of the usufruct of an estate did (according to our passage and below l 15. § 6) carry with it the usufruct of the working-plant. In D. VII. 8. l 16. pr. a legacy of the *use* of an estate *ut instructus esset* is spoken of.

facultatem] 'the power', i.e. 'the legal power' or 'right'. So Gai. II. 163 *Si adierit (hereditatem), postea relinquendae hereditatis facultatem non habet;* D. XXXV. 2. l 1. pr. *Lex Falcidia liberam legandi facultatem dedit usque ad dodrantem* (in the law itself the words are *ius potestasque esto*), XXVIII. 7. l 22; XXIX. 2. l 28. In D. XXXIX. 2. l 18. § 2 a usufructuary is said to have no right to security for possible damage to his own house from that of which he has the usufruct, *quia reficiendi habet facultatem; nam qui uiri boni arbitratu uti deberet, reficiendi quoque potestatem consequitur*, where legal power is at least principally regarded. The more frequent meaning of *facultas* is 'means', 'possibility' '(non-legal) power', e.g. Ulp. 24. § 26 *Ususfructus legari potest iure ciuili earum rerum, quarum salua substantia utendi fruendi potest esse facultas;* D. III. 3. l 73 *Non optulit pecuniam. Quid si tunc facultatem pecuniae non habuit?* X. 4. l 5.

§ 6; XLV. 1. l 137. § 4, &c. So *facultates* often in the sense of 'pecuniary means', e.g. Gai. II. 154 *Qui facultates suas suspectas habet.*

nam et si] Another analogous case is introduced as an argument. The working-plant is in the same relation to the estate, as is a wood not part of the estate, but utilized in connexion with it. This passage is in the Vat. Fr. § 70, but so mutilated that no help can be derived from it.

et sit ager unde, &c.] 'and if there be land whence the owner used to take poles for the use of the estate in question'. The *ager* is clearly not part of the *fundus*. This interpretation, as old as Accursius, is confirmed by the distinguishing addition to *fundum*, viz. *cuius usus fructus legatus est*, and by Steph. *ἔνθα οὐσούφρουκτος ἀγροῦ ληγατεύεται καὶ ἕτερός ἐστιν ἀγρός, ἐξ οὗ σύνηθες ἦν τῷ προπριεταρίῳ πᾶλους τινὰς... λαμβάνειν καὶ εἰς τὸν ἀγρὸν οὗ τὸν οὐσούφρουκτον ἐληγάτευσε μεταφέρειν.* Cf. Donell. *Iur. Ciu.* X. 7. § 9; Rudorff's note *n* to Puchta's *Cursus* § 255; Vangerow, *Pand.* § 344, Anm. I. 1 (I. p. 735). A case in point is found in an inscription at Petelia (Strongoli) *Corp. I. L.* X. No. 114.

palo] 'poles, stakes', used for fences, Varr. *R. R.* I. 14. § 2; or to train the vines to, Varr. *R. R.* I. 8. § 4; Col. IV. 12; 13; Plin. XVII. § 174. They were round sticks sharpened at the end, and opposed to *ridicae* which were cleft from the bulk (cf. Colum. XI. 2. § 11). See below on l 10. The singular number is often found for the generic name of articles of food or other daily purposes. So *salice*, *harundine* in next line and *caesae harundinis uel pali compendium* in l 59. § 2; *uestis* in l 15. § 5. Cf. Cic. *Sen.* 16 *Uilla abundat porco, haedo, agno, gallina, lacte, caseo, melle.*

pater familias] i.e. the testator, spoken of as *pat. fam.* in his capacity of absolute owner of the estate. So just below; and see note on l 13. § 5.

salice] 'willow', 'osier', 'withy' used for vine-poles, ties, basket-work, &c.; **harundine**, 'reed' for cross (and other) poles for vines. Cato *R. R.* 6. §§ 3, 4; 9; 33. § 5, &c.; Varr. *R. R.* I. 23. § 4; Plin. XVI. §§ 173—177; XVII. §§ 141—146; 174; Colum. IV. 12; 17; 30 *Quoniam constituendis colendisque uineis quae uidebantur utiliter praecipi posse disseruimus, pedaminum iugorumque et uiminum prospiciendorum tradenda ratio est. Haec enim quasi quaedam dotes uineis ante praeparantur...Quare salices uiminales atque arundineta uulgaresque siluae uel consulto consitae castaneis prius facienda sunt. Salicum uiminalium, ut Atticus putat, singula iugera sufficere possunt quinis et uigenis ligandae uineae, arundineti singula iugera uigenis iugandis; castaneti iugerum totidem palandis quot arundineti iugandis.* (The word *dos* was applied by analogy to denote the *instrumentum* of a vineyard as above (cf. D. XXXIII. 7. l 16. § 1), and in Col. III. 3. § 5; § 8; and the *instrumentum* of a farm which was let with the farm itself, D. XXXIII. 7. l 2. § 1; l 20. § 3; XLVI. 1. l 52. § 1; Cod. Theod. v. 14. l 4; called in Greek *ἐνθήκη*, D. XXXI. l 34. § 1; XXXII. l 68. § 3; Cod. Theod. v. 13. l 18. *Dos* was applied also to the corporate property of the Bakers' Company, Cod. Theod. XIV. 3. l 13; hence *fundi dotales* ib. l 7.)

hactenus uti posse, ne ex eo uendat] 'may use them, but is not allowed to sell of their produce'. The case is different however if the usufruct of a withy-bed or of a lopping-plantation or reed-bed is specifically bequeathed him. Then he is entitled to the produce as in any other case of usufruct, and can deal with it as he likes, his conduct being regulated only by the general duty to farm in a husbandlike manner.

siluam caeduam] 'a coppice' (from Fr. *couper*, to cut) or 'underwood'. Gaius, in D. L. 16. 1 30, pr., says, *silua caedua est, ut quidam putant, quae in hoc habetur ut caederetur: Seruius eam esse quae succisa rursus ex stirpibus aut radicibus renascitur.* Modern lawyers often speak of it as having a wider and a narrower meaning, the wider meaning, given first by Gaius, including any woods intended for felling; the latter meaning, that of Servius, being only coppice-wood. (See e.g. Hoffmann *Serv.* § 41; Vangerow *Pand.* § 344, Anm. 1.) I do not think it is necessary to suppose the meanings to be different; but Servius gives a more precise definition. For *silua caedua* is generally used in a context which best suits coppice-wood, and nowhere, so far as I see, where it must mean timber plantation. Cf. 1 10; 1 48. § 2; VIII. 3. 1 6. § 1; IX. 2. 1 27. § 26; XVIII. 1. 1 80. § 2; XXIV. 3. 1 7. § 7; L. 15. 1 4. pr. In XVIII. 1. 1 40. § 4 *arundinem caeduam et siluam in fructu esse respondit, et* should be supplied before *caeduam* (so Cujac.); XXIV. 3. 1 7. § 12 *puto autem si arbores caeduae fuerunt uel gremiales, dici oportet in fructu cedere* Haloander suggests *cremiales*, i.e. for burning. Stephanus interprets our passage of coppice (referring to the second meaning given by Gaius), τμητικὴ ὕλη ἐστὶν, ἥτις μετὰ τὸ τμηθῆναι πάλιν ἐκ τῶν ῥιζῶν ἢ ἐκ τῶν κλάδων φύει καὶ αὖθις ἀναδίδωσι. Cato, *R. R.* 1. § 7, places in order of profitableness the various kinds of land: *uinea est prima si uino multo siet; secundo loco hortus irriguus; tertio salictum; quarto oletum; quinto pratum; sexto campus frumentarius; septimo silua caedua; octauo arbustum; nono glandaria silua* (quoted by Varr. *R. R.* 1 7. § 9; Col. III. 3. § 1). Varr. *R. R.* I. 23. § 5 *Alio loco ut seras ac colas siluam caeduam, alio ubi aucupare.* Pliny XIII. § 39 *Sunt et caeduae palmarum quoque siluae rursus germinantes ab radice succisae;* and (after closing his account of fruit trees) XVII. § 141 *restat earum (arborum) ratio, quae propter alias seruntur ac uineas maxime caeduo ligno. Principatum in his obtinent salices.* Then, after mentioning *harundo* (§ 144), *castanea*, praised as *regerminatione caedua uel salice laetior* (§ 147: cf. Col. IV. 33. § 1 *castanea post quinquennium caesa more salicti recreatur*), and *aesculus* (§ 151), he proceeds *praeter haec sunt caedua quae diximus, fraxinus, laurus, persica, corulus, malus.* In fact a *silua caedua* was a frequent constituent of an ordinary farm, supplied it with poles and stakes, and was in regular cutting and a source of use and periodically recurrent profit as a crop. (It was cut at longer intervals than a year, D. XXIV. 3. 1 7. § 7.) Timber, so far as was required for the repair of the buildings, was grown along the roads (Cato 6. § 3; Varr. *R. R.* I. 24. § 3). The mountain timber-forests were hardly ordinary subjects of usufruct. If such a usufruct was granted,

felling at regular intervals would no doubt be intended and properly exerciseable. But in an ordinary usufruct of a farm express words would naturally be required to give a usufructuary a right to fell timber plantations. See 1 10. The Scholiast Dorotheus on Bas. XXVIII. 8. 1 7=D. XXIV. 3. 1 7. § 7 however understands the expression of felled timber, explaining *τῆς τεμνομένης ὕλης* by *τῶν ἐργασίμων μεγάλων ξύλων τῶν μετὰ τὸ κοπῆναι ἀποτιθεμένων ἐν τῷ ὄρει ὥστε ἀποβαλεῖν τὴν ὑγρότητα*. And Pliny, *Ep.* III. 19. § 5, speaks of woods producing timber being a source of regular profit, *Agri constant campis uineis siluis quae materiam et ex ea reditum, sicut modicum, ita statum praestant.* But Pliny may mean by *materia* poles and stakes. In English law 'Every tenant for life unless restrained by covenant or agreement has the common right of all tenants to cut wood for fuel to burn in the house, for the making and repairing of all instruments of husbandry, and for repairing the house and the hedges and fences, and also the right to cut underwood and lop pollards in due course. But he is not allowed to cut timber'. Josh. Williams, *Real Property*, p. 23, ed. 1880; Coke, *Litt.* p. 53. By the *Code Napoleon* § 591 the usufructuary can cut timber in forests which are regularly cut, but must follow the precedent of the former proprietors as regards quantity and times.

sicut pat. fam. caedebat] i.e. 'at such intervals of time and in the like quantities'. It is not clear whether Trebatius is speaking of the grant of a usufruct in express terms of a coppice or reed-beds, or of the usufruct of an estate having such on it besides other farming arrangements. Probably the doctrine would hold in either case. Heimbach in Weiske's *Rechts-Lex.* XI. p. 8. § 6 apparently takes *pater familias* in the sense in which it is used in § 2. But it can hardly denote here more than 'the former owner', though the usufructuary in this case as in others would of course have to act in a husbandlike manner. On this use of *pater familias* see below note on 1 13. § 5 (p. 108).

licet...solebat] *Licet* is generally used with the subjunctive in law Latin as well as in other; but occasionally we have the indicative, e.g. D. I. 3. 1 31; L. 16. 1 58. pr.

ad modum enim, &c.] 'we must look to the quantity used, not to the kind of use'. For *modus* and *qualitas* cf. D. XIX. 1. 1 42 *Si exiguus modus siluae desit et plus in uineis habeat (fundus) quam repromissum est...uideamus ne nulla querella sit emptoris in eodem fundo, si plus inueniat in uinea quam in prato, cum uniuersus modus constat...Rectius est in omnibus supra scriptis casibus lucrum cum damno compensari, et, si quid deest emptori siue pro modo siue pro qualitate loci, hoc ei resarciri;* XVIII. 1. 1 40. pr.

1 10. **ex silua caedua**] Bas. here and in 1 48 has *ἀπὸ τῆς καυσίμης*, but this is a mistake. Steph. understood it rightly. And so Bas. has *τεμνομένη* in D. L. 16. 1 30 (=Bas. II. 2. 1 20); XXIV. 3. 1 7. § 7 (=Bas. XXVIII. 8. 1 7).

pedamenta] 'props'. Cf. Varr. *R. R.* I. 8. § 1 *Quibus stat recta uinea, dicuntur pedamenta: quae transuersa iunguntur, iuga...* § 4 *Pedamentum*

fere quatuor generum. Unum robustum quod optimum solet afferri in uineam e quercu ac iunipero et uocatur ridica (cf. D. XLIII. 24. l 11. § 3): *alterum palus e pertica:...tertium quod horum inopiae subsidio misit arundinetum; inde enim aliquot colligatas libris demittunt in tubulos fictiles:...quartum est pedamentum natiuum eius generis, ubi ex arboribus in arbores traductis uitibus uinea fit.* Plin. XVII. § 174 *Pedamenta optuma quae diximus* (i.e. chestnut, horse-chestnut, ash, laurel, hazel, &c. §§ 147—151) *aut ridicae e robore oleaque; si non sint, pali e iunipero, cupresso, laburno, sabuco.*

ramos ex arbore] 'boughs from trees growing in the coppice'. The *pedamenta* would usually be stems growing from the roots or stumps: if there was a large tree, he might cut branches, but to fell the trees themselves was not allowed him.

in uineam sumpturum] In a coppice the usufructuary may cut for any purpose, even to sell; in a wood not intended for lopping (e.g. *silua glandaria*, see Cato quoted in note on *silua caedua*) he might cut what was required for the vineyard, but only if he could do so without spoiling the estate. A similar restriction was necessary even in a coppice, if the right was only a rural servitude, not a usufruct (D. VIII. 3. l 6. § 1).

l 11. **si grandes arbores essent**] I understand this to relate to large trees whether in a *silua caedua* or a *silua non-caedua*. A qualification 'except for the purpose of repairing the farmhouse' is added in l 12. pr.

l 12. pr. **arboribus euolsis**] 'pulled up by the roots', cf. D. XLVII. 7. l 7. § 2. It is difficult to see why *ui uentorum* is not applicable to *euolsis* as well as to *deiectis*. The action of water is the only involuntary agent besides wind that is likely to have upset a tree. Perhaps the explanation is this. Trees could fall either by the roots being pulled up or the stem being broken. Wind or human action is the most common agent in either case. Ulpian was going to speak quite generally (*euolsis uel deiectis*), but remembering the use of *deicere* of men felling trees he has inserted *ui uentorum* before *deiectis*. *Euellere* is also spoken of men's action as in D. XLVII. quoted above, but men would not pull up timber trees unless when very young and unimportant. For *deicere* cf. l 13. § 4; § 5; l 19. § 1; 6. l 2; XVIII. 6. l 9 *Si ab herede fundi ususfructus petitus sit, qui arbores deiecisset aut aedificium demolitus esset;* XXXII. l 55. § 2; Sic. Flac. p. 144, Lachm. *Si utrisque possessoribus conueniat ut finales arbores deiciant.* See Ulpian, quoted below on *nec materia* (p. 80).

usque ad usum, &c.] 'for his own use and that (i.e. the repair) of the farmhouse only' i.e. not for sale. *Usque* in this sense, of the extreme limit, is chiefly in expressions of place, time, number or the like, e.g. *usque in diem mortis suae* (D. XXXII. l 35. pr.); *praedia mea omnia quae sunt usque ad praedium quod uocatur Gaas* (ib. § 1); *usque ad partem dimidiam eius numeri manumittere permittitur* (Gai. I. 43). The words *usque ad usum* are confirmed by Vat. Fr. § 71.

ferre] 'carry off', 'take'. Cf. l 27. pr.; l 35. § 1; l 42. § 1; D. IX. 2. l 27. § 27 *Si salictum maturum ita, ne stirpes laederes, tuleris, cessare*

Aquiliam scribit (where Mommsen favours the reading of the inferior MSS. *secueris*); XLVII. 2. l 21. § 5 *Si de naui onerata furto quis sextarium frumenti tulerit;* XLVIII. 13. l 2. Here (compare also *auferret* two lines below) probably in the sense of taking as his share or profit, cf. XVII. 2. l 30 *Mucius scribit non posse societatem coiri, ut aliam damni, aliam lucri partem socius ferat;* Plin. *Ep.* v. 1. § 10 *Tuli fructum non conscientiae modo uerum etiam famae.* But unless taken for such purposes as the repair of the homestead, they apparently belong to the proprietor (l 19. § 1).

nec materia eum pro ligno usurum] *materia* is 'timber'; *lignum*, 'firewood'. Ulpian (D. XXXII. l 55. pr.) speaking of legacies says *Ligni appellatio nomen generale est, sed sic separatur ut sit aliquid materia, aliquid lignum; materia est quae ad aedificandum fulciendum necessaria est, lignum quidquid conburendi causa paratum est. Sed utrum ita demum si concisum sit, an et si non sit? Et Q. Mucius refert, si cui ligna legata essent, quae in fundo erant, arbores quidem materiae causa succisas non deberi: nec adiecit, si non comburendi gratia succisae sunt, ad eum pertinere, sed sic intellegi consequens est.* He goes on (§ 2) to point out that if a wood (*silua*) was intended to be cut up for firewood, *silua quidem non cedet, deiectae autem arbores lignorum appellatione continebuntur, nisi aliud testator sensit.* In our passage there is no such distinction of the trees supposed, and therefore the usufructuary is not justified in taking timber trees for firewood, unless he can find no firewood elsewhere.

si habeat unde utatur ligno] 'if he have other sources of supply of firewood'.

alioquin] 'otherwise' i.e. if this rule does not hold.

hunc casum passum] i.e. 'if all the trees on the estate had been torn up or blown down'.

materiam ipsum succidere] 'the usufructuary may himself cut timber', i.e. he may not only use what has fallen, but may fell. For *succidere* cf. Col. XI. 2. § 11, speaking of the month of January, *Ridicis uel etiam palis conficiendis idoneum tempus est: nec minus in aedificia succidere arborem conuenit. Sed utraque melius fiunt luna decrescente ab uigesima usque ad trigesimam, quoniam omnis materia sic caesa iudicatur carie non infestari;* Plin. XVI. § 58, &c. See above in note on *nec materia*, &c.

quantum ad uillae refectionem] 'as much as is required for the repair of the homestead'. *Attinet* or *pertinet* is understood. So D. II. 8. l 2. § 4; III. 3. l 33. pr. The verb is expressed in Gai. I. 73; 157; Ulp. XI. 8.

calcem coquere] Lime-burning is described by Cato *R. R.* 38; Vitruv. II. 5. See above on l 9. § 2 *cretifodinas.*

§ 1. **ad nauigandum**] The MSS. have *nauigandum* without *ad*, which is not Latin. Either the insertion of *ad* or correcting *nauigandum* to *nauigatum* is necessary. The former construction is usual in the Digest, e.g. IV. 6. l 35. § 1; XLI 2. l 1. § 11; XLII. 7. l 2. § 1. Mommsen suggests the latter correction.

The purport of the section is that the usufructuary of a ship is within

his right if he send it to sea, even though a storm be impending and the ship be eventually lost. Cf. D. VI. 1. l 16. § 1. Cf. ib. l 62. pr.

§ 2. **ipse frui ea re**] *Frui* is not strictly a technical word. It denotes taking the produce, or, more generally, having the full enjoyment of a thing, e.g. *In ea causa est, ut sine dolo malo in libertate fuerit atque ideo possessoris commodo fruatur* (D. XL. 12. l 12. § 3), and is thus applicable to an owner, or a possessor (Gai. IV. 167), or a tenant. As a purchaser was entitled to have lawful possession (*habere licere* D. XIX. 1. l 1. pr.; l 11. § 8), so a hirer was entitled to have the produce (*frui* D. XIX. 2. l 9. pr.; § 1; l 15. § 1, &c.) e.g. *si domus uel fundus in quinquennium pensionibus locatus sit,... colonus, si ea frui non liceat, totius quinquennii nomine recte aget, etsi reliquis annis dominus fundi frui patiatur* (D. XIX. 2. l 24. §§ 2—4). But it is also used frequently in the sense of 'exercising the rights of a fructuary'. So here. The fructuary in time loses his right, if he does not exercise it, but his exercise may be personal by his own enjoyment of the thing, or constructive by allowing another to enjoy. Cf. l 38. It was otherwise with a bare use. That required personal exercise. D. VII. 8. l 8; l 11.

alii fruendam concedere] 'to allow another to enjoy', or 'take the produce'. (*a*) *Concedere* is a general word, e. g. it is used of authoritative permission, Gai. I. 45 *Decem seruorum domino usque ad dimidiam partem eius numeri manumittere conceditur;* of surrendering a debt, D. XXXIV. 3. l 28. § 6 *Seio concedi uolo quidquid mihi ab eo debitum est;* of giving up property, D. XXVIII. 1. l 8. § 1 *Si cui aqua et igni interdictum sit,...eius bona, quae tum habuit cum damnaretur, publicabuntur, aut, si non uideantur lucrosa, creditoribus concedentur;* of granting a servitude, D. XXXIX. 3. l 17. pr. *Si prius nocturnae aquae seruitus mihi cessa fuerit, deinde postea alia cessione diurnae quoque ductus aquae concessus mihi fuerit,* &c., where the grant or permission (*concessio*) is distinguished from the formal creation of the servitude by *in iure cessio*. In the same way should be understood the grant of a road (D. XXI. 2. l 46. § 1), of a usufruct (D. XXXIII. 2. l 27), of the right of raising higher a house (D. VIII. 2. l 21), of a right to lead and draw water (ib. 3. l 2), and of several easements (ib. l 20, cf. l 16 of our title), though it is possible that the word in these passages may have originally been *cedere*. Both are found ib. l 14 *Per quem locum uiam alii cessero, per eundem alii aquae ductum cedere non potero: sed et si aquae ductum alii concessero, alii iter per eundem locum uendere uel alias cedere non potero.* For Justinian *cedere* and *concedere* would mean the same.

(*b*) But this application to the case of granting a servitude is different from its use in our passage. If I have a usufruct, I cannot grant that usufruct to any one so as to create in that person a new usufruct. The usufruct is connected with me, and reverts to the bare owner on my death or on my *capitis deminutio*, &c. But I can grant to another a right to its *de facto* exercise (comp. in English law an estate *pur autre vie*) so long as my title continues. The distinction between the sale (by a usufructuary) of this right, and the sale (by an owner) of a usufruct (created as a conse-

quence of the contract of sale) is neatly put by Paulus (D. XVIII. 6. l 8. § 2) *Cum usum fructum mihi uendis, interest utrum ius utendi fruendi quod solum tuum sit uendas, an uero in ipsum corpus, quod tuum sit, usum fructum mihi uendas: nam priore casu, etiamsi statim morieris, nihil mihi heres tuus debebit, heredi autem meo debebitur si tu uiuis; posteriore casu heredi meo nihil debebitur, heres tuus debebit.* In the first case the usufruct dies only with your life, in the second it dies only with mine. Cf. D. XXIV. 3. l 57, and Vangerow *Pand.* § 344 Anm. 3.

(*c*) That there could be no transfer of a usufruct from a usufructuary *A* to *B*, so that *B* becomes usufructuary in place of *A* is clear from Gai. II. 30 *Usus fructus in iure cessionem tantum recipit: nam dominus proprietatis alii usum fructum in iure cedere potest, ut ille usum fructum habeat et ipse nudam proprietatem retineat: ipse usufructuarius in iure cedendo domino proprietatis usum fructum efficit, ut a se discedat et conuertatur in proprietatem; alii uero in iure cedendo nihilo minus ius suum retinet; creditur enim ea cessione nihil agi.* This is confirmed by Just. II. 4. § 3; D. X. 2. l 15; XXIII. 3. l 66 (Pompon.) where however the words *si usus fructus extraneo cedatur, id est ei qui proprietatem non habeat, nihil ad eum transire sed ad dominum proprietatis reuersurum usum fructum* have been taken to mean that such a surrender is not merely null, but has the effect of extinguishing *A*'s usufruct. The different modes which have been suggested to reconcile this with Gaius' words *ius suum retinet*, &c. are discussed in Vangerow *Pand.* § 344 Anm. 3, who himself thinks Pomponius' words represent one view of jurists, which has been unintentionally left by Tribonian. I agree with Huschke *Studien* p. 241, Böcking *Pand.* § 164 n. 19 and others, who, calling attention to the future *reuersurum*, take the words to mean that this act of surrender to a stranger will not in any way prevent the eventual return of the usufruct to the owner, when the surrendering usufructuary dies or loses his *caput*, &c.

(*d*) The inability to transfer a usufruct arising from the nature of the right is well seen in the case put in D. XLVI. 2. l 4. There *A* is under an obligation to grant *B* a usufruct in some property: *B* wishes to extinguish a debt of his own to *C* by transferring *A*'s debt, just as he might desire to transfer to *C* a debt of money. This cannot be strictly accomplished: but *B* gets *A* to constitute a usufruct in favour of *C*. This is done by a stipulation made by *C* and a promise by *A*, just as if novation were intended (Gai. III. 176). But novation, though in one sense it created a new debt, required that the old debt should be modified into this new debt, not that a totally different thing should be substituted. Hence it often amounted to a mere transference of the debt from one person to another, e. g. *quem usum fructum debes Titio, eum mihi dare spondesne?* But *C* cannot stipulate for, and *B* cannot promise to create for *C*, *the* usufruct which *A* was bound to create for *B*: that usufruct is essentially connected with *B*'s person: and *A* can only create a similar usufruct, viz. that *C* should use and enjoy for *C*'s life. Ulpian however points out that as by this arrangement *A*

gives up the use and enjoyment for a period which may exceed that previously agreed on (for *C* may live longer than *B*), *A* is entitled to be protected (either by a plea of fraud or a special plea on the case) against any claim on the part of *B*, even if *B* outlive *C*.

uel locare uel uendere] 'either lease or sell'. In letting or leasing we retain the property or right, and part only for a time with the use or enjoyment, receiving in return a fixed hire in money (*merces*). In selling we part absolutely with the property or right and receive in return a fixed price in money (*pretium*). The purchase-money is usually a sum paid once for all or else in agreed instalments: hire or rent is usually paid at regularly recurring intervals throughout the period of the contract. But the mode of payment is not apparently of the essence of the contracts. In the case of a usufruct sale and lease would differ mainly by the contracts being for the whole duration of the usufruct or for a limited time (e. g. five years), and in any case would cease on the death or *capitis deminutio* of the usufructuary (D. XIX. 2. l 9. § 1). A bare use (*usus*) could not be leased or sold (D. VII. 8. l 8; l 11; X. 3. l 10. § 1); but the lease or sale of a usufruct is frequently mentioned, e. g. below ll 38—40; l 67; X. 3. l 7. § 10; XVIII. 6. l 8. § 2; XXIV. 3. l 57; Vat. Fr. 41. A lease or sale for a nominal consideration (*nummo uno*) was adopted as a convenient means of restoring to a woman after divorce the benefit of a usufruct, which the owner of the thing had given to the husband as dowry (D. XXXII. 3. l 66). A similar sale *nummo uno* was at one time the form by which the burden and benefit were transferred from an heir to a *cestui que* trust (Gai. II. 252). Whether the same was applied to the transfer by a legatee of a usufruct left by way of trust is not said. In the case of trust-usufructs however the Praetor eventually treated the legatee as a mere channel, and the usufruct was attached to and endured with the person of the *cestui que* trust just as if originally constituted in him. (D. VII. 4. l 4; 9. l 9. pr.) [On sales *nummo uno* see Leist *Mancipation* ch. VII., Bechmann *Kauf* §§ 23, 24. Instances occur in Bruns *Fontes* Pt. II. 1; 2 b; e.] But in cases of regular inheritance it was not possible for a person once an heir to part with his legal position and put another into his shoes. An inheritance once accepted was no more alienable than a usufruct. But in both cases the practical object might be accomplished. The sale of an inheritance is the subject of a special title of the Digest (D. XVIII. 4). The purchaser of either inheritance or usufruct would bear the burden and take the profits of the position. Only he would be answerable to the heir or to the usufructuary for any neglect of duty, and any legal measures against third parties for the protection of his rights would be taken by or in the name of the heir or usufructuary, not in his own name.

qui locat utitur, &c.] He uses, i. e. exercises his right as usufructuary, by receiving the rent or hire or price. (See l 35. § 1; l 39; and cf. D. XXIX. 4. l 5 *Si quis uendiderit hereditatem, utique possidere uidetur.*) *Utitur* is not here opposed to *fruitur*, though even such a use on the part of a usufructu-

ary conscious of his full rights is sufficient to preserve his rights (D. VII. 4. l 20); but it means 'exercise his rights', as in D. VII. 4. l 25 *Placet uel certae partis uel pro indiuiso usum fructum non utendo amitti;* ib. l 28; and below l 38 *Non utitur usufructuarius, si nec ipse utatur nec nomine eius alius, puta qui emit,* &c.: and comp. *usucapio* 'taking by use, or by exercise of right'. If the proprietor hired or purchased the usufruct and sold it to some one else, the usufruct so hired or purchased was lost. Indeed in the case of purchase it would be merged. In the case of hire the proprietor would of course be liable to the fructuary by an action on the sale (D. VII. 4. l 29. pr. § 1).

precario concedat] 'allow the enjoyment of the usufruct at (the usufructuary's) will'. This stands in a relation to gift (*donare*) somewhat analogous to that in which lease does to sale. It is a temporary surrender of the enjoyment, as gift is a permanent surrender, and both alike are unbought. *Precarium est quod precibus petenti utendum conceditur tamdiu, quamdiu is qui concessit patitur...Et distat a donatione eo quod qui donat sic dat ne recipiat; at qui precario concedit sic dat, quasi tum recepturus cum sibi libuerit precarium soluere* (D. XLIII. 26. l 1. pr.; § 3). Such a tenancy, or holding at will, might exist in moveables and immoveables, corporeal and incorporeal things, e.g. in a servitude (ib. l 2. § 3—l 4. pr.). The tenant was answerable for fraud (*dolus*) and gross negligence only (ib. l 8. § 3—§ 6), and restitution was enforceable by an interdict (l 2; l 14) and also by the *actio praescriptis uerbis* (l 2. § 2; l 19. § 2). The tenancy was regarded as strictly personal, and therefore did not pass to the tenant's heir (l 12. § 1). It carried with it the possession, and the tenant had a right to the interdict *uti possidetis* against every one, except him who allowed the tenancy (l 2. § 1; l 17). Mere casual occupation (e.g. as a guest) did not amount to such a tenancy nor give possession (l 6. § 2; l 15. § 1). A person who having given a pledge asked to retain the use of it was decided to be a precarious tenant of his own property so pledged and restored (l 6. § 4). There is an interesting discussion of *precarium* by Savigny *Recht des Besitzes* § 42. He suggests that originally *commodatum* was confined to moveables (D. XIII. 1. § 1) and *precarium* to immoveables, and that the jural recognition of *precarium* had its origin in the relation between the nobles and their clients. Cf. Mommsen *Gesch.* B. I. cap. 13; II. 2. On the law of *precarium* generally see Vangerow *Pand.* § 691.

donet] Julian defines gift as follows: *Dat aliquis ea mente ut statim uelit accipientis fieri nec ullo casu ad se reuerti, et propter nullam aliam causam facit, quam ut liberalitatem et munificentiam exerceat: haec proprie 'donatio' appellatur* (D. XXXIX. 5. l 1. pr.).

puto eum uti] Evidently the point whether by giving away (the enjoyment of) a usufruct a man ceased to use it and thereby in course of time lost it, was not beyond question. The principles on which the extinction of a usufruct by non-use rests are, I suppose, the presumption that non-use means abandonment of the right, and the desire on the part of the

legislator that property should be in active use and enjoyment, if not by one man, then by another. In the case of a gift by *A* to *B* of (the exercise of) a usufruct belonging to *A* there will be a user, namely *B*, and *A*'s gift is so far from being any evidence of abandonment that to treat it as abandonment would imply that a man gives only what he does not care to keep.

retinere] 'retains' i.e. does not lose his usufruct. Similarly D. III. 3. l 72 *Per procuratorem non semper adquirimus actiones sed retinemus: ueluti si reum conueniat intra legitimum tempus*, &c.

sed] The Flor. MS. has *seu:* Steph. has ἀλλ' εἰ καὶ. Evidently *sed* is a necessary correction.

negotium meum gerens] A person who took upon himself to act for another without being asked by him was said *negotium alienum gerere.* If his services were beneficial, he had a right of action against the other (whose business he was doing) for the expenses and liabilities incurred in the due conduct of such business; while the other had an action against him to compel him to account for any profits received and to make good any damage accruing from his unlicensed interference (D. III. 5. l 2; XLIV. 7. l 5. pr.). The cause of such an interference is usually the absence or ignorance of a man, and the risk of his interests being injured by neglect or delay (ib.). The agent was liable for fraud and fault, but not for the unsuccessful issue of his action, if the action itself was not contrary to the principal's intentions (D. III. 5. l 9; l 10; l 11. § 1; l 12. Cf. l 3. § 9). Ratification by the principal did not change the character of the action into one of *mandati* (ib. l 8).

In the proposed case the usufructuary retains the usufruct because it is represented by the rent, which is the same evidence of enjoyment, whether the letting was conducted by the usufructuary himself or by another acting on his behalf and accountable to him.

locauero] The Greek Steph. confirms this reading (1st pers. sing.). Mommsen suggests *locauerit.* But *locauerit* would refer to the person *negotium meum gerens* mentioned in the previous sentence, and thus would not be consistent with a fresh mention of the same person again (*absente et ignorante—quis*), or would lead to the awkwardness of having two such persons spoken of. I see no objection whatever to *locauero.* Ulpian takes first the case of letting, divided into two, myself letting, or another letting for me; then takes the case not of letting but of actual user by an unasked agent.

nihilo minus ret. us. fr.] I retain the right, because the unauthorised agent is accountable to me for the use and enjoyment; and this claim for value is substantial evidence of my still exercising my rights.

§ 3. **fugitiuus**] A runaway slave was one who left his master's house, or concealed himself, with the intention of withdrawing himself from his master's service altogether. A definition of a fugitive is given for the purposes of the aediles' edict in D. XXI. 1. l 17. The retaking of fugitive

slaves was a matter of public concern (D. XI. 4). A *lex Fabia* of uncertain date, but confirmed or enlarged by one or more decrees of the Senate (temp. M. Antonin.), forbad the sale or harbouring of any slave in flight. Paul. *Sent.* I. 6 A; D. XLVIII. 15. l 2—l 5; Cod. VI. 1. l 4; IX. 20. l 2; l 6; cf. D. XLVII. 2. l 36.

in quo us. fr. est] So D. XLV. 3. l 32; XLI. 1. l 43; *in quo us. fructum habet* D. II. 14. l 55; XLV. 3. l 33; *cuius us. fr. est* D. XLI. 2. l 49.

stipuletur aliquid ex re mea] i. e. make a formal bargain for something, the bargain being founded on a use of what is my property; e. g. if he lend some of my money, stipulating for its repayment with interest. This mode of expression is common in the Digest; e. g. l 25. §§ 3, 5, 6; III. 3. l 68; VII. 8. l 14. pr.; XLI. 1. l 37. § 5; XLV. 3. l 1. § 5; l 20. pr.; l 22 *Seruum fructuarium ex re domini inutiliter fructuario stipulari, domino ex re fructuarii utiliter stipulari;* &c. Stipulation was one mode of acquisition, and *acquirere ex re* is to acquire by the use, or on the ground, of a thing. Cf. Gai. II. 87 *Quod serui nostri mancipio accipiunt, uel ex traditione nanciscuntur, siue quid stipulantur uel ex aliqualibet causa adquirunt, id nobis adquiritur.* 91 *De his autem seruis in quibus tantum usum fructum habemus, ita placuit, ut quidquid ex re nostra uel ex operis suis adquirunt, id nobis adquiratur;* ib. III. 163 sq. *Stipulari ex re* &c. seems to find its justification in the fact that when a stipulation was immediately added to a loan (or other contract, cf. Savigny *Syst.* v. 493) the two contracts were fused into one. Cf. D. XLV. 1. l 126. § 2 *Quotiens pecuniam mutuam dantes eandem stipulamur, non duae obligationes nascuntur sed una uerborum;* XLVI. 2. l 6. § 1; l 7.

Our text is also in the Vat. Fr. 89, but the words *ex re mea* are not found there and doubtless have been added by Tribonian. The words *stipuletur aliquid* by themselves would certainly include too much, if taken unconditionally of any and all stipulations. The usufructuary could not acquire by the stipulations of a slave of which he had the usufruct, except *ex re usufructuarii* or *ex operis serui*, i. e. unless the usufructuary's property or the slave's services were the cause of the stipulation. And even this might be frustrated, if the slave expressed the intention of acquiring for the owner (not the usufructuary). See Gai. II. 87, &c. quoted above; and below l 25; D. XLV. 3. l 1. § 5; l 22 (quoted above); l 27; l 28. pr. Why however did not Tribonian add the whole of the usual words *ex re mea uel ex operis suis?* I suppose because *ex operis suis* would have required further distinctions. A runaway slave's services belonged to the usufructuary only so long as he was not *bona fide* possessed by some one else. *Qui bona fide alicui seruit, siue seruus alienus est siue homo liber est, quidquid ex re eius cui seruit adquirit, ei adquirit cui bona fide seruit. Sed et si quid ex operis suis adquisierit, simili modo ei adquirit: nam et operae quodammodo ex re eius cui seruit habentur, quia iure operas ei exhibere debet, cui bona fide seruit* (D. XLI. 1. l 23. pr.). Possession *ui, clam*, or *precario* did not interrupt the usufructuary's right (ib. l 22). But

even this *bona fide* possession by another does not destroy my usufruct, if the slave from time to time stipulates for me and uses my property. See below in this and next section.

per traditionem accipiat] Vat. Fr. 89 has (*mancipium*, a mistake for) *mancipio accipiat*. With this substitution of delivery for mancipation compare D. XLI. 1. 1 10. § 1 where we have *quod serui nostri ex traditione nanciscuntur* for *quod serui nostri mancipio accipiunt uel ex traditione nanciscuntur* (Gai. II. 87 quoted in last note). The form of mancipation having ceased to be used, and the distinction of *res mancipi* and *res nec mancipi* being abolished, common delivery became applicable to all things without distinction. Tribonian must often have made like changes, e. g. 1 29. § 1; VII. 8. 1 14. pr.; 1 20, &c. See also note on 1 3. pr. *et sine testamento* (p. 38), and on 1 4 *uel praesens* (p. 43).

It is presumed that the slave's acceptance of delivery is either made expressly on behalf of the fructuary or at least not expressly on behalf of the owner. *Fructuarius seruus si dixerit se domino proprietatis per traditionem accipere, ex re fructuarii totum domino acquiret: nam et sic stipulando ex re fructuarii domino proprietatis adquireret* (D. XLI. 1. 1 37. § 5; see the whole law; cf. XLV. 3. 1 39, &c.). The way in which such an express acceptance was made in case of mancipation is given in Gai. III. 167.

per hoc ipsum, quasi utar] 'by this fact, as if thereby I were using', i. e. exercising my right.

magisque admittit retinere] 'and Pomponius inclines to admit that I retain the usufruct'. Vat. Fr. have *retineri*. For *magis adm.* cf. D. XIX. 2. 1 9. § 1 *Sed an ex locato teneatur conductor, Marcellus quaerit: et magis admittit teneri eum;* XXIX. 2. 1 6. § 4. Similarly *magis puto* X. 3. 1 14. § 1; *magis arbitratur* XXXVI. 1. 1 11. pr.; &c.

praesentibus] opposed to *fugitiuus*. Actual use is not necessary to the retention, in circumstances which give no presumption of abandonment. See 1 55.

infante] Varro according to Censorinus (*de die nat.* 14) made five ages, each, except the last, of fifteen years; (1) *puer*, (2) *adulescens*, (3) *iuuenis*, (4) *senior*, (5) *senex*, the last including all who were upwards of sixty years old. According to Servius (ad Verg. *Aen.* v. 495) he made five ages, (1) *infantia*, (2) *pueritia*, (3) *adulescentia*, (4) *iuuentas*, (5) *senecta*. Solon, partly following Hippocrates, made ten ages, each of seven years (Censor. 14. § 4). Quintilian speaks of some persons being opposed to giving children any literary instruction under the age of seven, but himself recommends them to be taught as soon as they can speak (*ex quo loqui poterunt*), and takes this latter period as the age of three, and *infantia* as the first seven years (I. 1. §§ 15—21). Macrobius speaks of the seventh year as that *quo plane absoluitur integritas loquendi* (*Som. Scip.* I. 6. § 70). According to the lawyers an *infans* was one *qui fari non potest* (D. XXXVI. 1. 1 67 (65) § 3; XL. 5. 1 30. § 1) and this is identified with age under seven by D. XXVI. 7. 1 1. § 2. See also XXIII. 1. 1 14; Cod. Theod. VIII. 18. 1 8; *Inst.* VI. 30.

l 18, pr. With the Romans speech was the necessary (or presumed) instrument of the most important legal acts, and thus *fari posse* meant to be capable of legal acts. Hence we may take *fari posse* as not simply being able to speak, but being able to speak with knowledge of the words, though it may be not with knowledge of the full import of the business. Hence all under the age of puberty (14 in boys, 12 in girls) had guardians *Infanti placebat ex stipulatu actionem non esse, quoniam qui fari non poterat, stipulari non poterat* (D. XLV. 1. l 70). *Pupillus omne negotium recte gerit, ut tamen, sicubi tutoris auctoritas necessaria sit, adhibeatur (tutor), ueluti si ipse obligetur; nam alium sibi obligare etiam sine tutoris auctoritate potest ... Sed quod diximus de pupillo, utique de eo uerum est, qui iam aliquem intellectum habet: nam infans et qui infanti proximus est non multum a furioso differt; quia huius aetatis pupilli nullum intellectum habent: sed in his pupillis propter utilitatem benignior iuris interpretatio facta est;* i. e. for convenience they are allowed to act *auctore tutore.* (Gai. I. 107, 109.) See Savigny *Syst.* § 107 (Vol. III. 25 sq.); Schrader ad Just. *Inst.* III. 19. § 10. In the present passage, as a slave is spoken of, *infans* is probably to be taken in a general, not a technical, sense; cf. l 55.

cuius operae nullae sunt] 'an infant's services are nothing'. *Operae* meant 'the services of a slave' or 'freedman', in fact 'a servant's work' and was used often in a quasi-technical meaning, so that *singulae operae* were 'one day's work'; Varr. *R. R.* I. 18. § 2 *Saserna scribit satis esse ad iugera* VIII *hominem unum: ea debere eum confodere diebus* XLV, *tametsi quaternis operis singula iugera possit. Sed relinquere se operas* XIII *ualetudini, tempestati, inertiae, indulgentiae;* Colum. II. 12. § 1 *Tritici modii quatuor uel quinque bubulcorum operas occupant quatuor, occatoris unam, sarritoris duas primum, et unam cum iterum sarriuntur, runcatoris unam, messoris unam et dimidiam, in totum summam operarum decem et dimidiam,* &c. i.e. 'Four or five bushels of wheat require four days' work of ploughmen, a harrower for one day, a hoeer for two at first and one more when hoed again, a weeder for one day, a reaper for one and a half; *Lex Urson.* 98 (p. 119, Bruns[4]) *eam munitionem fieri licet, dum ne amplius in annos singulos inque homines singulos puberes operas quinas, et in iumenta plaustraria, iuga singula, operas ternas decernant.* 'The Council of the Colony may require for public works not more than five days' work in the year from each grown man and three days' work from each pair of cart-beasts'; D. XL. 7. l 20. § 5 *Quaedam condiciones nec possunt eodem tempore impleri...uelut cum decem operarum (operas ?) iussus est dare, quia operae per singulos dies dantur;* XXXVIII. 1. l 1 *operae sunt diurnum officium;* XIX. 2. l 51. § 1 *Locaui opus faciendum ita ut pro opere redemptori certam mercedem in dies singulos darem; tametsi conuenit, ut in singulas operas certa pecunia daretur, praestari tamen a conductore debet, si id opus uitiosum factum est;* XLV. 1. l 54. § 1; below l 37. (*Operae* is also used for 'workmen', e.g. Col. XI. 2. § 82; Cic. *Sest.* 17; D. XLV. 1. l 137. § 3; &c.)

The services of an infant could not amount to anything; those of one older, though still *impubes*, might be something (below l 55; D. VI. 1. l 31; XXXVIII. 1. l 7. § 5).

defectae senectutis homine] 'a man of worn out old age'. Such constructions as *primam quamque arborem senio defectam tollere* (Col. v. 6. § 37); *ignoscitur etiam his qui aetate defecti sunt* (D. XXIX. 5. l 3. § 7) are more common. So *defectum fundum fertilem praestitit* (Cod. XI. 59. l 7). *Defectus* is also used of a legatee, &c. disappointed by the failure of a condition *defectus conditione* (Gai. II. 144; D. XXXV. 1. l 31), of the legacy or share lost or abandoned by the like failure (ib.); of bad debts *defecta nomina* (D. XXII. 1. l 11. § 1).

retinemus us. fr.] We retain the usufruct because we exercise all the rights which the object admits of. It is not the fruits in an economical sense that we have to take: if the land is barren, there are none to take: we have only to do no act and refrain from no act, which act or which refraining can reasonably be regarded as an abandonment of our right.

fugitiuus] Vat. Fr. § 89 here adds *intra annum mancipioue* (*mancipioque* MS.) *accipiat.* See note on l 5 *leg. temp. amitti* (p. 44).

qua ratione retinetur, &c.] The usufruct in a runaway slave is retained on the like principle to that on which the possession of the same is retained by the owner. This principle is, that as possession is retained by the will to hold as owner, though the immediate physical control does not exist (i.e. *animo*, though not *corpore*), an opposing act of will by another is required to divest our possession (D. XLI. 2. l 3. § 7 sqq.; l 25. § 2). But a slave is not capable of such a will. *Fugitiuus idcirco a nobis possideri uidetur, ne ipse nos priuet possessione* (ib. l 13. pr.). *Haec ratio est quare uideamur fugitiuum possidere, quod is, quemadmodum aliarum rerum possessionem interuertere non potest, ita ne suam quidem potest* (ib. l 15), where *suam* = *possessionem sui.*

The possession of a thing is not compared to possession of a usufruct but to the usufruct itself, which was really an effective natural possession and quite compatible with a legal possession by the owner. *Permisceri causas possessionis et ususfructus non oportet, quemadmodum nec possessio et proprietas misceri debent: nam neque impediri possessionem si alius fruatur, neque alterius fructum amputari si alter possideat* (D. XLI. 2. l 52. pr.).

§ 4. Julian (as quoted by Ulpian) proceeds to discuss whether the analogy between possession and usufruct holds as regards their extinction. If adverse possession of the slave is gained, the owner loses possession, the intention by which he holds being deforced by the intention of another who has gained also the corporal possession. Does the usufructuary similarly lose his right by another's having got the legal possession? No: his exercise of the usufruct is always accompanied by another's having the legal possession, and who that other is, matters nothing to him so long as he can exercise his usufruct. Consequently he holds on, though the slave

do nothing on his behalf which would keep the right alive, until the statutable period has arrived (see note on l 5 *leg. tempore amitti*, p. 44): and he does not lose it at all, if within that period the slave bargains for him so that the slave's act can count as an exercise of his usufruct.

intra constitutum tempus] doubtless an alteration of Tribonian for *intra annum*. See above and note on l 5 *leg. temp. amitti* (p. 44).

adquiri] *adquiri potest* MSS. Mommsen after others suggests the omission of *potest*; the retention of which could only be defended by supposing that Ulpian corrects Julian: but as Ulpian continues Julian's argument in the next sentence, and this argument evidently implies Julian's agreement to this sentence, *potest* cannot stand. One of the inferior MSS. has *colligit* (for *colligi*), which harmonizes better with *potest*.

colligi posse dici] 'it may be said it is proved'. For *colligi* cf. D. I. 3. l 19; XXII. 5. l 18; XXXVIII. 1. l 25.

ne quidem] see below on l 15 fin. (p. 126).

paruique referre] 'it is of small consequence', 'it matters little'. A usufruct was not affected by a change in the ownership of the property (D. VII. 4. l 19), nor by possession being gained by another (see above on § 3). What particular person may gain possession of a runaway slave is immaterial to the usufructuary, whether such person have or have not a legal claim to the property in the slave.

ab herede...uel...uel...an] The real contrast is between the legal and the illegal occupant. The heir, a purchaser of the inheritance, a legatee of the propriety, have all a *prima facie* right, and for this purpose any of them may be taken as examples; and they all form but one alternative: a *praedo* forms the other.

ab herede possideatur] Evidently the usufruct in question is supposed to have been left by will, the heir retaining the bare ownership.

cui hereditas uendita sit] The sale of an inheritance is the subject of a title in the Digest (XVIII. 4) and of one in the Code (IV. 39). One who had accepted the position of heir could not afterwards divest himself of it, but remained the representative of the deceased both in his rights and obligations. But he could agree with another to relieve him practically both of the benefits and burdens of the position. This was effected by a sale, either for a substantial or a nominal consideration (*nummo uno* cf. note on l 12. § 2 *loc. uel uend.* p. 83), of the whole of the goods, credits and liabilities of the deceased, accrued and accruing. The purchaser brought and defended actions in the affairs of the inheritance, but originally only in the name of the heir, afterwards by a constitution of Antoninus Pius he could bring such actions (*utiles*) in his own name (D. II. 14. l 16. pr.; Cod. IV. 39. l 5). The goods were transferred by delivery (D. XVIII. 4. l 14). The contract of sale was binding, like any other contract, only between the parties, and did not affect the rights of third parties, e.g. the creditors and legatees, who could still recover from the heir. The heir, would then by an action on the sale, or the stipulation

accompanying it (Gai. II. 252), get reimbursement from the purchaser, just as, if profit accrued to him, or would have accrued to him if he acted *bona fide*, he would account to the purchaser (D. XVIII. 4. l 2. §§ 4—9). If the Crown (*fiscus*) sold an inheritance, the transfer was complete and the creditors could enforce their claims only against the purchaser (Cod. IV. 39. l 1). All rights and liabilities which the heir, before heirship, had against or to the inheritance were enforceable against or by the purchaser (D. XVIII. 4. l 2. §§ 18—20; VIII. 4. l 9).

The surrender (*in iure cessio*) of an inheritance under the old law had very different effects (Gai. II. 34 sqq.; III. 85 sqq.).

cui proprietas legata sit] The case put is one in which both the propriety and the usufruct have been bequeathed away from the heir, but to different persons.

praedone] 'a robber'. This term is frequently used in the Digest of one who gets or retains possession of a thing without any ground of right. It means *mala fide possessor*. Cf. D. V. 3. l 25. § 3 *Loquitur de praedonibus, id est, de his qui cum scirent ad se non pertinere hereditatem, inuaserunt bona, scilicet cum nullam causam haberent possidendi:* ib. l 11. § 1—l 13. pr.; l 22; l 28; l 31. pr.; IX. 4. l 13 *Non solum aduersus bona fide possessorem, sed etiam aduersus eos qui mala fide possident, noxalis actio datur: nam et absurdum uidetur eos quidem qui bona fide possiderent excipere actionem, praedones uero securos esse.* A *praedo* is distinguished from *fur* and *raptor* (D. V. 3. l 13. pr.), *fur* being used only of moveables (D. XLVII. 2. l 25), *raptor* implying force (D. XLVII. 8. l 2. § 10; § 23).

sufficere enim, &c.] It is sufficient for the retention of the usufruct that the usufructuary should have the intention (lit. 'mental condition of one who wills') to retain, and that the slave should do something (i.e. some act of a characteristic nature) in the name of the usufructuary.

§ 5. **decerpserit uel desecuerit**] 'plucked or cut down', the former being applicable to ordinary fruits (e.g. olives, grapes, apples, &c.), the latter to corn, grass, &c. Cf. D. IX. 2. l 27. § 25 *Si oliuam inmaturam decerpserit uel segetem desecuerit inmaturam uel uineas crudas Aquilia tenebitur;* XLVII. 2. l 25. § 2 *Eorum quae de fundo tolluntur, ut puta arborum uel lapidum uel harenae uel fructuum, quos quis furandi animo decerpsit, furti agi posse nulla dubitatio est*, where *quos...decerpserit* is fitted to *fructus* and applies by zeugma to *arbores*, &c. In ib. l 26. § 2 *decerptus* is used in reference to *fructus stantes* (see below p. 92, note on *pendentes*).

maturos] 'ripe for gathering'. Even though unripe, if the fructuary gathers them, they become his property (infr. l 48. § 1, where see note); and though ripe, if not gathered, they are not his (D. XXXIII. 1. l 8). For gathering unripe fruit he may or may not be answerable to the proprietor: that would depend on the circumstances, and amongst them on the relation of ripeness to the profitable use of the object of the usufruct (D. XXXIII. 2. l 42). But in the usual course of things fruits when ripe are a source of immediate interest to the fructuary, though if not gathered they

remain the property of the bare owner. A similar connexion of thought in the use of *maturos* is in l 27. pr. Cf. D. XIX. 1. l 13. § 10. Gathering and taking the fruit when unripe would subject the thief to an action on the *lex Aquilia* in addition to the other actions (D. IX. 2. l 27. § 25).

pendentes] 'still hanging', i.e. not yet separated from the tree. Cato, *R. R.* 146, gives a form of contract for sale of *olea pendens*, and 147 of *uinum pendens*, i.e. an ungathered crop of olives, and of grapes. So D. XVIII. 1. l 39 *qui fructum oliuae pendentis uendidisset;* XX. 1. l 15. pr.; VI. 1. l 44; XLVII. 2. l 62. § 8 *fructus pendentes.* In XXIV. 3. l 7. § 15; XLVII. 2. l 26 we have *fructus stantes* used of a like class of things, the former term being properly applicable to grapes, olives, apples, &c., the latter to corn, grass, and the like. In l 27 (of our title) both terms are used: *Si pendentes fructus iam maturos reliquisset testator, fructuarius eos feret, si die legati cedente adhuc pendentes deprehendisset; nam et stantes fructus ad fructuarium pertinent.*

cui condictione teneatur] 'who has the right of bringing a *condictio* against him'. Theft was punishable by the criminal law (Gai. III. 189 sq.; D. XLVII. 2. l 93), but was also the subject of civil proceedings in an *actio furti* which was of a penal character and subjected the defendant, if condemned, to infamy (Gai. IV. 8; 182). Further, the thief was liable in a personal action for restitution (*condictio ex furtiua causa*), and might be liable in a vindication, and in an action *ad exhibendum* (Gai. IV. 4; D. XIII. 1. l 7. § 1).

(*a*) A *uindicatio* could be brought by an owner against the possessor for the time being, whether the thief himself or one who had got the stolen property innocently or guiltily (D. VI. 1. l 9). If the thief had parted with the property before the action was brought, the action did not lie against him. Parting with it fraudulently, after action brought, left him liable as before (ib. l 17). The aim of the action was to recover the thing with all that belonged to it, or accrued by reason of it (ib. l 20). But if the thing was destroyed, e.g. if a slave or animal died, without the possessor's fault, the action was as a rule only good for the recovery of the fruits or other belongings (ib. l 15. § 3; l 16).

In the case mentioned in the text a usufructuary could not bring a vindication as owner; the fruits were not his before gathering: whether he could bring the *confessoria* against the thief, who thus interfered with his rights as usufructuary, is not said (cf. D. VII. 6. l 5. § 1; § 7).

(*b*) An action *ad exhibendum* could be brought by any one who had reasonable ground for requiring the production of a thing (D. X. 4. l 2; l 3. § 9); and against any one who had the actual possession of the thing or had fraudulently parted with it (ib. l 3. § 15; l 9. pr.). In case of non-production the defendant was liable for the value of the plaintiff's interest, i.e. for what he loses by its non-production; and this might be more or less than the value of the thing (ib. l 9. §§ 7, 8; l 11. pr.). As against a

thief, this action would be useful, if the thief had parted with the stolen property before action brought (cf. D. XII. 1. l 11. § 2 fin.).

(*c*) A *condictio* was brought to recover what had wrongfully become the property of another. A *uindicator* claimed what was his own property but was wrongfully detained from him by another: he must assert *rem suam esse.* A *condictor* admitted that the property was in another: but claimed that the defendant *rem dare oportere.* As theft did not change the property in the thing stolen, it was really an abuse of the *condictio* to allow it to be brought against a thief, and Gaius admits this, and only excuses it *odio furum* (Gai. IV. 4). In truth the positive law against theft's changing the property could not alter the natural consequences of the act: if the thief mingled the stolen money or the goods with other of the same kind, identification became impossible; and if he consumed the stolen goods, that was no reason for defeating the owner's right to restitution (cf. Savigny *Syst.* v. *Beil.* XIII. 15). But if the owner parted with his property in the stolen goods, his right to bring a condiction lapsed (D. XIII. 1. l 10. § 2). The aim of the action was the recovery of the stolen thing, or, failing that, its value, with its fruits and incidental advantages (*id quod interest agentis*, ib. l 3). A condiction could be brought only by the owner who had been robbed, and only against the actual thief or his heir or heirs (in proportion to their shares, l 9). The destruction of the thing stolen or death of a slave stolen did not defeat this action as it defeated vindication (ib. l 7; D. XLVII. 2. l 46. pr.; Gai. II. 79). Recovery of the thing, or damages obtained in one of these last two actions, was a bar to the other being brought (D. XLVII. 2. l 9). A practical distinction between the three actions is given in D. XII. 1. l 11 *Uindicari nummi possunt si extant; aut si dolo malo desinant possideri, ad exhibendum agi; quod si sine dolo malo consumpsisti, condicere tibi potero.*

Both in *uindicatio* and *condictio*, under the formulary system, the condemnation 'sounded in damages', i.e. it was expressed in the formula as money: but this condemnation was actually passed, only if restitution of the thing claimed and its accessories was refused or impossible (Gai. IV. 48; 114; cf. Just. IV. 17).

(*d*) An action for theft (*actio furti*) was not intended to restore to the owner the thing stolen or its equivalent, but to inflict a heavy penalty. A successful plaintiff recovered twice the greatest value of the stolen thing, or, if the thief was caught in the act, fourfold such value (Gai. III. 189, 190; D. XLVII. 2. l 50. pr.). This action was wholly independent of vindication or condiction, and could be brought and the penalty recovered, even after recovery of the thing and its accessories had been obtained in either of those actions. Nor was success in this action any bar to either of those being brought subsequently (ib. l 55. § 3; Cod. VI. 2. l 12. § 1). This action lay against the thief, his advisers and accomplices (Gai. III. 202; D. XLVII. 2. l 50. §§ 1—3). Theft was defined as a fraudulent handling for the sake of gain, either of a thing, or of the use or possession of a thing

(*Furtum est contrectatio rei fraudulosa lucri faciendi gratia uel ipsius rei uel etiam usus eius possessionisue* D. XLVII. 2. l 1. § 3). An action for theft might therefore be brought by various persons (e.g. a bare owner, a usufructuary, a mortgagee, a borrower of the thing stolen) for the same act of theft, and the success or compromise of the one did not affect the rights of the others. For any one was entitled to the action who was interested and had a right to the thing or to its possession or use, or with the consent of the owner was responsible for its safe keeping (ib. l 14. esp. § 16; l 46. § 5; l 60; l 86, &c.; Gai. III. 203 sqq.). Where the usufruct was in one and the ownership in another, each had an action to the extent of his interest. *Diuidetur actio inter dominum et fructuarium: fructuarius aget de fructibus uel quanti interfuit eius furtum factum non esse eius..., proprietarius uero aget, quod interfuit eius proprietatem non esse subtractam* (D. XLVII. 2. l 46. § 1).

non fiunt fructuarii] See n. on l 9. pr. (p. 67).

terra separentur] Whether corn or grapes, they would, till cut, be connected with the ground. Hence gathering (*perceptio*) is different from, though it may include, separating them from the ground. Cf. D. XLI. 1. l 48. pr. *Fructus, etiam priusquam percipiat, statim ubi a solo separati sunt, bonae fidei emptoris sunt;* XXII. 1. l 25. § 1 (quoted above on l 9. pr. p. 67); VII. 4. l 13.

magis proprietario, &c.] *Magis* implies that Julian had some hesitation in the matter. Probably the doubt was, whether the condiction should not be held to be in suspense, until the eventual property in the fruits was ascertained.

competere] literally, 'to aim together' is used in the historians of being (mentally) 'collected', e.g. Sall. ap. Non. p. 276 *Sic uero quasi formidine attonitus neque animo neque auribus aut lingua competere;* and frequently in Columella of a thing suiting or being practicable, e.g. IX. 1. § 1 *utcunque competit proximus aedificio loci situs,* 'whenever suitable'; II. 18. § 2 *Si non competit, ut in uillam foenum portetur,* &c. In the law writers it is common in the sense of legal fitness or competence, e.g. *apud competentem iudicem* (D. II. 1. l 19. pr.) 'before a judge with competent jurisdiction'; *competenti remedio* (D. I. 18. l 7) 'with a proper remedy'; so of an action frequently, as here; cf. D. L. 16. l 54 '*Condicionales creditores' dicuntur et hi quibus nondum competit actio, est autem competitura, uel qui spem habent ut competat;* of a right, cf. D. XXXVII. 1. l 3. § 9 *Si plures sint quibus bonorum possessio competit* and again *hae portiones quae ceteris competerent.* It is also used absolutely, below l 66; Gai. IV. 112; &c.

furti actionem] See note above p. 93.

quoniam interfuit, &c.] The use of the indicative ought to imply that Ulpian was speaking his own view, and not merely quoting Julian's, but such an implication in the Digest is doubtful. As to the fact, see D. XLVII. 2. l 10 *Cuius interfuit non subripi, is actionem furti habet.*

mouetur eo] 'is moved by this circumstance', i.e. 'finds a ground for doubt', 'sees occasion for consideration in this'. Cf. D. III. 5. l 7. § 3

Mouetur eo, quod, si data fuerit aduersus eum actio, necesse erit et eum pertingi qui uetuit; Collat. XII. 7. § 10; D. IV. 3. l 7. § 8 *ego moueor;* XIII. 1. l 17 *Nec me mouet, praesens homo fuerit necne;* XXXIII. 2. l 26; XLVII. 2. l 55. § 1; l 75.

fortassis fiant eius] Evidently it was not a clear point to Marcellus that under the circumstances the fructuary had any right to the fruits. He had not plucked them; they remained the property of the proprietor, although stolen by the thief: it was questionable whether now the fructuary had or could make any claim to them at all. Hence he says *fortassis.* 'It may be, notwithstanding this apparent lapse on the part of the fructuary, that if he yet gets hold of them they become his'.

si fiunt] as to mood, see note above on *quoniam interfuit.*

qua ratione] 'on what principle', 'by what mode of argument?' Cf. D. XLVII. 2. l 62. § 8 *Qua enim ratione coloni fieri possint?* See above l 7. § 1 *hac ratione.*

efficiantur] The Flor. MS. has *efficientur:* the inferior MSS. *efficiuntur.* In matters of this kind the language of the lawyers is loose: but certainly no other mood than that of *efficiantur,* which Haloander conjectured, is tolerable in Latin. *Efficerentur* is a possible reading. But the use of the present subj. following the imperfect subj. is found sometimes in classical writers; e.g. Caes. *B. G.* v. 58 *praecipit...unum omnes peterent Indutiomarum, neu quis quem prius uulneret quam illum interfectum uiderit.* In our passage the change may be intentional, the point of time being taken when the produce has already become the property of the proprietor, and the chance of its being seized by the usufructuary is yet in the future.

exemplo rei, &c.] 'according to the analogy of a thing bequeathed conditionally'. Pending the condition, the property is in the heir. Cf. D. XXXI. l 32. § 1 *Fundum ante condicionem completam ab herede non traditum sed a legatario detentum heres uindicare cum fructibus potest;* X. 2. l 12. § 2. If the thing bequeathed is in the possession of the heir, the legatee can require security, or in default was put by the Praetor into possession, subject to account, D. XXXVI. 3. l 1. § 2; 4. l 5. § 22.

uerum est enim] Here Ulpian confirms the somewhat hesitating opinion of Julian. See above note on *magis proprietario* (p. 94).

cum autem in pendenti est dominium] 'but whenever the ownership is in suspense'. In the case just treated of, Ulpian, agreeing with Julian, held that the ownership was not in suspense, but was for a time in the proprietor until the fructuary seized the fruits, on which occurrence the property passed to the fructuary; if the fructuary never seized the fruits, the property would remain with the proprietor. This is a case of what is often called by modern writers *dominium reuocabile:* there is a true owner for a time who can bring a suit as such; but since on the property being divested some intermediate acts would be invalidated, such a revocable ownership is easily confused with suspended ownership, in which there is for a time no owner at all. See Vangerow *Pand.* §§ 95, 96, 301;

Wächter *Pand.* § 69 and *Beilage* IV.; and my notes below on l 25, and l 70. The Greeks do not recognise the distinction clearly made in this passage. They probably took *cum est* as 'since it is'; a use sometimes found.

in pendenti] A common phrase; cf. l 25. § 1; XXIII. 3. l 80; XXVI. 1. l 6. § 4; XXXVIII. 17. l 10. § 1; XLV. 1. l 106, &c.; *in suspenso esse* D. XXX. l 86. § 2; IX. 4. l 15; &c.

in fetu qui summittitur] 'in the young which is allowed to grow up'. See ll 68—70 where the matter is fully treated.

in eo quod seruus, &c.] See below l 25. § 1, and note thereon.

ab eo satisfacto] 'enough having been done by him to content the seller'. *Satisfacere* is a word of much more general and less technical meaning than *satisdare* (on which see note on *caueri* p. 57). It comprehends any fulfilment of a condition, duty, judgment, &c. Cf. D. II. 4. l 1 *Satisdatio eodem modo appellata est quo satisfactio. Nam ut satisfacere dicimur ei cuius desiderium implemus, ita satisdare dicimur aduersario nostro, qui pro eo quod a nobis petit ita cauit* ('has taken precautions'), *ut eum hoc nomine securum faciamus datis fideiussoribus;* XLV. 1. l 5. § 3; so *satisfactum est eiusmodi condicioni* (D. XXXVI. 1. l 79. § 1); *arbitri sententiae fuerit satisfactum* (XXXV. 1. l 50); *ante rem iudicatam satisfacere actori* (Gai. IV. 114). It is frequently contrasted with *soluere*, and may include giving real security (*pignus*), or personal security (*fideiussores*), or another's undertaking the debt (*expromissio*): e.g. D. XLVI. 3. l 52 *satisfactio pro solutione est;* XL. 7. l 39. § 1 *Stichus liber esto, quando aes alienum meum solutum creditoribusue meis satisfactum erit;* XIII. 7. l 9. § 3 *Omnis pecunia exsoluta esse debet, aut eo nomine satisfactum esse, ut nascatur pigneraticia actio* ('suit for recovery of a pledge'): *satisfactum autem accipimus quemadmodum uoluit creditor, licet non sit solutum, siue aliis pignoribus sibi caueri uoluit, ut ab hoc recedat, siue fideiussoribus, siue reo* [i.e. *expromissore*] *dato, siue pretio aliquo uel nuda conuentione;* XIV. 4. l 5. § 18; XVIII. 1. l 53; and below l 25. § 1.

pendere] The MSS. have *dicendum est condictionem pendere, magisque in pendenti esse dominium;* which, Mommsen thinks, is confirmed by Bas. ἤρτηται οὖν καὶ ἡ τοῦ πράγματος ἀπαίτησις καὶ ἡ δεσπότεια: but as this is in the Basilica placed before the examples *in fetu*, &c., it seems more probable that the words are merely a summary. The Greek Commentators are here not decisive. Mommsen concludes that the MS. reading is either redundant or stands for something like *magisque sequi quod in pendenti est dominium.* I have omitted the latter part as certainly redundant, and probably due to the copyists, one of whom perhaps noticing that Julian's words in the case of a slave's receiving goods for which he does not pay cash were *in pendenti esse dominium* (see l 25. § 1), has written these in the margin and prefixed *magis* to imply that Julian's words were not precisely given in our text.

l 13. pr. **potest in ea re—hoc fiat**] literally 'can demand sureties to be given in respect of that thing, so that the same may be done by the judge's

authority'. The sentence is awkward. One would have expected rather *dominus potest in ea re desiderare ut officio iudicis satis detur.* As it is, we must take *ut...fiat* as an afterthought by way of explanation.

satisdationem] See note on l 7. § 1 *caueri* (p. 57).

officio iudicis] A common phrase implying that it is to be done by the judge as a matter within his competence and as part of his duty as judge in the case, whether it be the express object of the suit or not, and whether it be enjoined by the testator or not. In fact it is much the same as 'without special application or plea or authorization'. Cf. D. v. 3. l 38 *Sed benignius est in praedonis quoque persona haberi rationem impensarum (non enim debet petitor ex aliena iactura lucrum facere), et id ipsum officio iudicis continebitur, nam nec exceptio doli mali desideratur;* III. 5. l 5. § 14; l. 6 *Si forte non fuerit usurarium debitum, incipit esse usurarium.....quia tantundem in bonae fidei iudiciis officium iudicis ualet, quantum in stipulatione nominatim eius rei facta interrogatio;* D. VI. 1. l 9; l 76; X. 2. l 18. § 2; 3. l 6. § 10; XIX. 2. l 19. § 3; l 25. § 5; XXI. 1. l 43. § 6; XXIII. 5. l 7. § 1; XLIV. 4. l 4. § 3; &c. See also Just. IV. 17.

nam sicuti debet, &c.] 'for as the fructuary has a right to the use and produce, so the proprietor has a right to be secured in the proprietorship'. And this is so however the usufruct may have been constituted. The judge's duty then is (1) to require a usufructuary to give security, before he is allowed to enforce his right to the usufruct; (2) when a complaint is made respecting the usufructuary's mode of dealing with the thing, not only to settle any disputes about the past, but also to prescribe a course for the future; (3) if there are two usufructuaries, either to divide the usufruct between them, or to compel them to give each other bonds to respect each other's rights.

Then in the fourth section Ulpian proceeds, after giving a general rule for the conduct of the usufructuary, to apply it to the cases of bequest of the usufruct of a country estate (§ 4), of a building (§ 7), of a family residence (§ 8), of slaves (l 15. § 1), of moveables (§ 3), and particularly of garments (§ 4), and theatrical properties (§ 5). He then gives a corresponding rule for the conduct of the proprietary (§ 6), and deals specially with the questions of the imposition of servitudes (§ 7); of the dedication of land to religious purposes (l 17. pr.); of slaves (§ 1).

ad omnem us. f.] 'any and all usufructs', i.e. however created. For this use of *omnis* cf. l 3. pr. *omnium praediorum iure legati potest constitui ususfructus;* Hor. *Ep.* I. 5. 2 *nec modica cenare times holus omne patella.* For the law cf. 9. l 1; Cod. III. 33. l 4 (anno 226) *Usufructu constituto consequens est, ut satisdatio boni uiri arbitrio praebeatur ab eo apud quem id commodum peruenit, quod nullum laesionem ex usu proprietati adferat. Nec interest siue ex testamento siue ex uoluntario contractu ususfructus constitutus est.*

probat] not 'proves', but 'approves', i.e. Julian agrees that these prin-

ciples apply, &c. Similarly with an acc. and infin. D. XLIII. 24. 1 15. § 11; 27. 1 1. § 5 *Praeterea probandum est, si arbor communibus aedibus impendeat, singulos dominos habere hoc interdictum;* XIX. 2. 1 50.

si usus fructus legatus sit] These words are superfluous and awkward; we ought to have only what is common to all usufructs. Probably they were in the text on which Julian was commenting.

dandam actionem] i.e. the Prætor should not grant the usufructuary the right to sue the heir to put him in enjoyment of the usufruct, until he has given sureties, &c. This oblique sentence is dependent on *probat*, but as Ulpian agrees with Julian, he soon passes into direct language (*oportet*).

se boni uiri arb. &c.] See the 9th title of this book esp. l 1, and my note above on l 7. § 2 *per arbitrum cogi* (p. 58). For *boni uiri arb.* see note on l 9. pr. (p. 67).

This same stipulation could be obtained afterwards, if the heir had made delivery without it. The proprietor could either bring a vindication for the property, and if the usufructuary pleaded that it had been delivered to him on the ground of usufruct, make a replication, or could directly claim this stipulation by a *condictio* (9. l 7. pr.).

plures a quibus, &c.] 'even if there should be more than one person on whom the usufruct is charged', i.e. if the testator should have given the estate or thing to several persons as heirs, and have given the usufruct in it to another or others.

For *a quibus.....relictus est* see note on l 7. § 2 *ab ea re relicta* (p. 65).

singulis satisdari oportet] 'each of these proprietors is entitled to receive security from the usufructuary', i.e. in proportion to their respective shares. D. VII. 9. l 9. § 4 *Si plures domini sint proprietatis, unusquisque pro sua parte stipulabitur.* If the usufructuary gave ground of complaint, each proprietor would obtain damages only in proportion to his own share in the proprietorship. If the property were divided, the *arbiter familiae erciscundae* would deal with these stipulations according to the mode of division or adjudication arrived at (cf. D. X. 2. l 22); and his arrangements would be supported by the Praetor (ib. l 44. § 1).

§ 1. **cum igitur de u. f. agitur**] 'whenever then a suit is brought about the usufruct', i.e. by the proprietor to keep the usufructuary within proper limits of use. So Steph. *ἡνίκα δὲ ὁ προπριετάριος κατὰ τοῦ οὐσουφρουκτουαρίου τὴν ἐκ ταύτης τῆς ἱκανοδοσίας κινεῖ ἀγωγήν.* The action would be brought on the stipulation.

arbitratur] sc. *iudex*. So apparently Steph. But it may be taken as passive with *quod factum est* as subject. Cf. Sen. Rhet. *Contr.* III. *Praef.* § 13 *Hoc ita semper arbitratum est, scolam quasi ludum esse, forum arenam;* D. XL. 7. l 12. § 5 *Sumptus funeris arbitrantur* ('are fixed') *pro facultatibus uel dignitate defuncti;* IV. 8. l 27. § 4 *Si quis litigatorum defuerit, quia per eum factum est quominus arbitretur* ('an award be made'), *poena*

committetur; and again in same section. See Neue, *Formenlehre*, II. p. 274.

debet] sc. *usufructuarius.* The judge has not only to assess damages for past infractions of duty, but to give directions for the due use and enjoyment for the future, and that will comprehend what the usufructuary must do or refrain from doing, and also what he may do, i.e. what the proprietor must permit.

§ 2. **lege Aquilia**] The *lex Aquilia*, of uncertain author and date, but conjecturally referred to A.U.C. 467 (Rudorff, *R. G.* I. § 41) superseded the provisions of the Twelve Tables and other statutes, and, being enlarged by the interpretation of the lawyers, was the principal source of actions for physical injury caused by any malice or fault of one person to the person or property of another. The cause of action was called *damnum iniuriâ datum*, and the action was often called briefly *damni iniuria* (sc. *dati*), or abusively *damni iniuriae.* The statute was directed against any one who slew (*occiderit*) a slave or four-footed animal (*pecudem*) belonging to another; or burnt, broke or tore (*usserit, fregerit, ruperit*) anything belonging to another. The damages were to be measured by the greatest value within the preceding year in the case of slaying, or within the last thirty days in the other case. The owner was the person entitled to sue. Denial by the defendant, if the case was proved, doubled the damages. (Gai. III. 210 sqq.; D. IX. 2, esp. l 1; l 21; l 27. § 5; l 23. § 10; l 29. § 8.)

Interpretation, partly by introducing analogous actions *in factum*, extended the sphere of the remedy in many ways, so as to comprise not only slaying, but causing death (e.g. a poisoner, though he did not himself administer the poison, D. l. c. l 9. pr.; one who frightened a horse which threw its rider, though he did not himself push the rider off, &c. l 9. § 3); not only burning, breaking, &c., but any kind of physical damage, l 27. §§ 13—17; not only damage done to a slave or animal belonging to one, but damage done to a child under one's power or to oneself (l 5. § 3; l 13. pr.). Not only the owner, but also a usufructuary or pledgee, could bring the action or an analogous one (*utilis actio* l 11. § 10; l 30. § 1); and the value of the thing damaged was taken to mean all that the owner would have obtained by means of it (e.g. to include an inheritance to which a slave was made heir). D. l. c. l 22. § 1—l 23. § 6.

Of offences coming under this law and affecting our present title there are mentioned, cutting down timber before it was old enough (D. l.c. l 27. § 26); setting fire to the farm-house (ib. § 8; § 11), or to a wood (Cod. III. 35. l 1), pulling down or firing a dwelling-house (Cod. ib. l 2), treating a slave improperly, so as to make him less valuable (D. l.c. l 27. § 17; below l 15. § 2), or killing or maiming him, &c.

tenetur] 'is bound by', i.e. is liable under. Cf. Cic. *Caecin.* 14. § 41 *Hoc interdicto Aebutius non tenetur;* Gai. III. 144; IV. 4 *quo magis pluribus actionibus teneantur.* The plaintiff is put in the dative, e.g. Gai. III. 85 *ob id creditoribus ipse tenebitur.*

interdicto] There are many occasions on which an immediate interposition of authority is necessary to secure people in the present enjoyment of their rights, real or apparent, instead of leaving them to have their rights violated and then bring an action for damages. If the law does not interfere temporarily to protect possessors *de facto*, violence and serious complications may ensue before the rights of the parties can be legally determined. Hence the Praetor was in the habit of issuing on application injunctions to do, or to forbear doing, certain things. These injunctions were called generally *interdicta:* sometimes positive injunctions were called *decreta* (Gai. IV. 139; cf. 142; Just. IV. 15. § 1). After such an injunction was issued, if obedience was not given to it, a judge or *recuperatores* were empowered by a formula to inquire into the allegation of disobedience, and award possession or damages accordingly (Gai. IV. 140 sq.; 161 sq.). After the formulary process was abolished, the matters formerly for interdict were dealt with by *actiones utiles* (Just. IV. 15. § 8). The name however was retained in the Digest.

The principal classes of interdicts were (*a*) for securing the due possession of a deceased person's property by the person authorized temporarily or permanently by the Praetor (D. XLIII. 2. 3. 4); or the possession of a bankrupt or confiscated estate (Gai. IV. 145, 146); (*b*) for preventing interference with the due enjoyment of public places, roads, rivers, &c. (D. XLIII. 6—15); (*c*) for preventing interference with private possessors of land, moveables, easements, &c. (ib. 16—25; 31); (*d*) for recovering land held on sufferance; (*e*) for obtaining the production of testamentary documents or of freedmen or children (ib. 5; 29; 30); (*f*) for allowing for certain purposes entry on neighbour's land (ib. 27; 28). See also Cod. VIII. 1—9.

quod ui aut clam] This interdict was so called from its initiatory words. As given by Ulpian (D. XLIII. 24. 1 1. pr.) it ran thus: *Quod ui aut clam factum est, qua de re agitur, id, cum experiendi potestas est, restituas.* Some words are evidently omitted to which *cum exp.* refer. The insertion, after *id* and before *cum*, of the words *si non plus quam annus est* (cf. l 15. § 4) is generally adopted (see Mommsen *ad loc.;* Rudorff, *Edict.* p. 225; Lenel, *Ed. Perp.* p. 387). 'Anything that has been done by force or stealth in the matter in question, if it is not more than a year since there has been an opportunity of suing, you are to restore'. This injunction may be brought by any one who had a present interest in the matter (e. g. owner, fructuary, farm-tenant, tenant at will, licensee to fell timber), and against any one in possession of the land or not, who executed the work (l 11. § 12; l 12. § 4; l 15. pr.; l 16. § 2). The work or act must be one connected with land (l 1; l 7. § 5; l 20. § 4); e. g. (to take acts improper for a fructuary) one who erected a building, who pulled down a building, who cut down trees, who dug trenches in the ground, who fouled the water of a well, who removed a statue, who turned his rain-drop on to a tomb, was liable to this injunction (l 7. § 5; l 9; l 11). Any possessor was bound to permit the old state to be restored: the doer was bound, besides this,

to defray the expense, and was liable for any loss the injured party had incurred (l 16. § 2; l 15. § 7; &c.). The suit could not be defeated by a claim of right to do the particular act complained of: if a man had a right, his proper course was to give notice to the owner or other person interested, whose interference he might anticipate, of his intention to act, and in that case the injunction would not issue (l 1. §§ 3—7). *Ui facit*, whoever acts contrary to any prohibition, or forcibly prevents a prohibition (l 1. § 5 sq.; l 20. §§ 1—3); *clam facit*, whoever acts without specific notice or after insufficient notice (l 3. § 7—l 5. § 4). Such act might be defended if done to demolish a work erected *ui aut clam*, or to prevent a fire spreading (l 7. §§ 3, 4), or if the doer offered security, while his right was challenged by a regular action (l 3. § 5).

The spheres of this interdict and of the Aquilian law were different, but intersected one another. The interdict is closely related and complementary to the *operis noui nuntiatio* (D. XXXIX. 1. l 1. § 1), and is applicable concurrently with the Aquilian, only where that can be brought for injuries to land or connected with it. The original object of the Aquilian was damage to slaves and animals, and injuries to land come under it only because no special exclusion was made. Besides this difference in the sphere, fault however slight (D. IX. 2. l 44. pr.) was necessary and sufficient to ground the Aquilian action; but for the interdict force and stealth in the technical senses, i.e. disregard of notice and absence of notice, had to be proved. Fault in the ordinary sense was not required. (D. XLIII. 24. l 15. § 11 relates only to fault as affecting the possibility of restoration.) Where the interdict and the Aquilian action (or any other) concurred, if a man recovered full damages, the interdict could not be brought. Both proceedings could be brought by heirs, and, so far as heirs had profited by the work or act, also against heirs (D. IX. 2. l 23. § 8; XLIII. 24. l 13. § 5; l 15. § 3).

fructuarium quoque] 'a fructuary as well as others'.

nec non furti] sc. *actione*, 'aye and (in an action) of theft'. *Necnon* is properly used only to introduce an unexpected affirmative. Sometimes *nec non et* D. II. 14. l 9. pr. Here probably Ulpian has in his mind not merely plain acts of theft, such as removing and selling valuable marbles from a house, but a taking of what was not really fruits, or an unjustifiable use of the property. He says (D. XLVII. 2. l 46. § 6) *Proprietarius quoque agere aduersus fructuarium potest iudicio furti, si quid celandae proprietatis uel supprimendae causa fecit.* There was nothing in the position of a fructuary to exempt his acts from being treated as thefts. Even an owner was liable for theft, if he removed from his creditor a thing which he had pledged to him (ib. l 12. § 2; l 19. §§ 5, 6), or from a borrower a thing which he had lent him, and on which the berrower had claims on account of expenses (ib. l 15. § 2; l 60), or if he removed or improperly handled a thing of which another had the usufruct (l 15. § 1; l 20. § 1). So a borrower using a thing otherwise than he thought the

owner would allow (l 40; l 77), or lending it to others (l 55. § 1), or a tailor or cleaner using or lending clothes sent him to mend or clean (l 48. § 4; l 84. pr. &c.) are held liable for theft.

consultus] sc. *Iulianus.* Cicero often speaks of the practice of the lawyers to give advice to any who consulted them, and this being done in public formed a kind of practical instruction to law students who attended them regularly. *Orat.* 42. § 143 *Alteros respondentes audire sat erat, ut ei qui docerent.....eodem tempore et discentibus satisfacerent et consulentibus; Brut.* 89. § 106 *Ego autem iuris ciuilis studio multum operae dabam Q. Scaeuolae Q. F., qui, quamquam nemini se ad docendum dabat, tamen consulentibus respondendo studiosos audiendi docebat.* Official authority was given to these answers of certain jurists by Augustus: D. I. 2. l 35. § 49 *Ante tempora Augusti publice respondendi ius non a principibus dabatur, sed qui fiduciam studiorum suorum habebant consulentibus respondebant: neque responsa utique signata dabant, sed plerumque iudicibus ipsi scribebant aut testabantur qui illos consulebant*[1]. *Primus diuus Augustus, ut maior iuris auctoritas haberetur, constituit ut ex auctoritate eius responderent: et ex illo tempore peti hoc pro beneficio coepit.* Cf. Seneca *Ep.* 94. § 27 *iurisconsultorum ualent responsa, etiamsi ratio non redditur.* Gaius says I. 7 *Responsa prudentium sunt sententiae et opiniones eorum, quibus permissum est iura condere. Quorum omnium si in unum sententiae concurrant, id quod ita sentiunt legis uicem optinet: si uero dissentiunt, iudici licet quam uelit sententiam sequi: idque rescripto diui Hadriani significatur.* Whether such opinions were obtained by the parties and presented by them to the judge, or obtained by the judge himself; whether all were consulted as a body (which is not probable), or any one or more as the parties chose, we do not know. (Cf. Zimmern, *Rechts-Gesch.* I. § 54 p. 200 sq.; Walter II. § 431; Clark, *Pract. Jur.* pp. 293 sqq.) Two practical examples in the Digest (III. 5. l 33; XIX. 1. l 43) appear to be questions submitted by a judge to Paulus. In one an opinion of Ulpian is said to have been produced and read.

quo bonum fuit, &c.] 'what was the good of the Praetor's promising an action?' Cf. D. XXXVII. 4. l 3. § 11 *Cum enim possit secundum tabulas habere possessionem, quo bonum est ei contra tabulas dari?* ib. l 10. § 4; XLVI. 3. l 93. pr. *Quo bonum est hoc dicere?* Papinian ap. *Collat.* IV. 8. § 1. For this use of *quo* cf. Hor. *Sat.* I. 1. 73 *Nescis quo ualeat nummus, quem praebeat usum?* Ov. *M.* XIII. 103 *Quo tamen haec Ithaco* (sc. *datis*)*?* (The like use of *quo* indef. is in Caes. *Gall.* VII. 55 *ne quo esset usui Romanis,* where even the latest editor, A. Holder, reads *quoi* against the MSS. and against the rules of Latin. The Romans did not use such an attribute as *quoi* with a predicative dative. See my *Lat. Gr.* II. Praef. p. XXX.)

[1] i.e. 'In general the lawyers wrote their opinions to the judges, or those who consulted the lawyers made an affidavit of their having heard the opinion'. I do not doubt that *ipsi* is the *prudentes*, though differing in this matter from the excellent authority of Prof. Clark, *Pract. Jurispr.* pp. 283, 293. I cannot find *testor* used in the jurists of 'calling witnesses.' It is 'declare before witnesses'.

actionem poll. praet.] The Praetor promises an action usually by compelling the giving of a bond by the usufructuary as the condition of his being put into possession. Cf. D. XLVI. 5. l 1. pr. *Praetoriarum stipulationum tres uidentur esse species, iudiciales, cautionales, communes..... Cautionales sunt quae instar actionis habent, et ut sit noua actio intercedunt, ut de legatis stipulationes et de tutela et ratam rem haberi et damni infecti.* But the Praetor's jurisdiction was not limited to this.

sunt casus quibus] 'there are cases in which'. *Quibus* is of course for *quibus casibus*, and hence *in* is not necessary (cf. *Lat. Gr.* § 1242). Cf. Gai. II. 144 *quibus casibus pater familias intestatus moritur;* III. 34 *quibus casibus;* 179 *nec magis his casibus nouatio fit;* IV. 77 *quibusdam casibus;* II. 146 *hoc casu;* 181 *quo casu*, &c. But also I. 139 *in hoc casu:* D. I. 7. l 17. § 5 *in his casibus;* above l 4, &c.

cessat] *Cessare* both in classical and in law Latin denotes inactivity where action might be expected: 'to loiter', 'be idle', 'rest'. Hence of persons: e.g. D. XXVI. 7. l 1. § 1 *Ex quo scit se tutorem datum, si cesset tutor, suo periculo cessat;* XVII. 1. l 38 *si diu in solutione reus cessabit:* of money lying idle, D. XVII. 7. l 13. § 1 *Dicit cessasse pupillarem pecuniam, quod idonea nomina non inueniret;* of arrangements which were not made, D. V. 2. l 17 *cessante cautione repetitio datur* 'if there is no bond'; XXV. 2. l 17. pr. *ubicumque cessat matrimonium, cessare rerum amotarum actionem* 'if the marriage is not valid'; frequently as here of an action not lying, e.g. IX. 2. l 49. § 1, &c. (It does not, like the English 'cease', imply that the thing, having existed or acted, exists or acts no longer.)

The Aquilian action is not always applicable, because the usufructuary may do no positive act leading to the injury (which the Aquilian law requires), but may neglect to do what he ought to do. Negligence rarely comes under the Aquilian statute; see however D. IX. 2. l 8. pr.; l 27. § 9, where the negligence accompanies a positive act. Cf. Vangerow, *Pand.* III. p. 582; Hasse, *Culpa* pp. 21, 134, 283 ed. 2.

Aquiliae actio] i.e. *legis Aquil. actio*, the action granted by the Aquilian statute.

eius arbitratu utatur] 'that he may exercise his usufruct subject to what the judge may think right'. So also Steph.

qui agrum non proscindit] cf. Varr. *R.R.* I. 27 *Uere sationes quaedam fiunt; terram autem proscindere oportet;* ib. 29. § 2 *Terram cum primum arant, proscindere appellant;* Col. III. 13. § 4 *Nonnulli omnem uitem per denos pedes in quincuncem disponunt, ut more noualium terra transuersis aduersisque sulcis proscindatur.* The legal effect of this is only that, if in the particular case ploughing up new land is within the meaning of *recte colere* (cf. l 9. pr.), the usufructuary may be compelled to do it; and the mode of compulsion is by action on the praetorian stipulation, as the *lex Aquilia* does not apply (nor the interdict *quod ui aut clam*).

qui uites non subserit] 'who does not plant vines in place of those dead', &c. Cf. Col. IV. 15. § 1 *Plurimum interest adhuc noua consitione*

pedamen omne uestiri; nec mox uineam tum subseri, cum fructus capiendus est (where a special case only is referred to). The word appears not to be used elsewhere.

aquarum ductus corrumpi] *Corrumpi, corruptus* are frequently used of what is in any way ruined or spoilt. Thus *ruptum* in the *lex Aquilia* was interpreted by the more general word *corruptum;* Gai. III. 217 (restored by aid of Just. IV. 3. § 13) '*ruptum' intelligitur quod quoquo modo corruptum est: unde non solum usta aut fracta, sed etiam scissa et conlisa et effusa et quoquo modo uitiata aut perempta aut deteriora facta hoc uerbo continentur.* So below l 50 of a ruined building *uillam uetustate corruptam;* of a foundrous road D. XLIII. 19. l 3. § 12 *Corrupto itinere minus commode frui* (*iri* conj. Mommsen) *aut agi potest;* Hor. *Sat.* I. 5. 95 *longum carpentes iter et factum corruptius imbri;* of watercourses, Frontin. *Aq.* 120 *Nascuntur opera ex his causis: aut inpotentia* ('greed') *possessorum quid corrumpitur aut uetustate aut ui tempestatium aut culpa male facti operis...Fere aut uetustate aut ui (tempestatium eae) partes ductium laborant, quae arcuationibus sustinentur aut montium lateribus adplicatae sunt.* Again § 127; D. XLIII. 21. l 1. § 6 (quoted above l 7. § 2 *reficere* p. 58). It is used of the atmosphere being polluted, below § 6; of moveables in general, l 15. § 3; of a skilled slave, l 17. § 1.

eadem et in usuario dic. sunt] 'the same rule applies to the case of one who has the bare use'. Of course the different positions of a usuary and a fructuary give a different result. The usuary having a very restricted right to produce (cf. D. VII. 8. l 10. § 4; l 12; l 15. pr.; l 22. pr.) would be more likely to be liable under an action for theft; and, as the duty of repairs is often shared with the proprietor, he would be less likely to be chargeable with negligence. The remedy, by stipulation, was the same. *Usu legato si plus usus sit legatarius quam oportet, officio iudicis qui iudicat quemadmodum utatur, quid continetur? ne aliter quam debet utatur;* a somewhat oracular reply (ib. l 22. § 2 Pompon.).

§ 3. **duos fructuarios**] Such cases are often mentioned: the second title of this book treats of one aspect of them, that of accretion.

quasi com. diu. iud. dari] 'that a trial analogous to that for partition of common goods should be granted'. What is here described as *quasi c. d. iud.* is in D. X. 3. l 7. §§ 6—8 called *utile c. d. iudicium.* The regular *c. d. iud.* was applicable only for dividing corporeal things (ib. l 4. pr.), but the Praetor allowed a trial of the same nature for the partition of a pledge between the pledgees; or of a usufruct; or of a right to hold property as a security for the payment of legacies (these not being *res* but *iura in re*); as also for recovery of a share of the expenses incurred on a common object (ib. l 9), or profit received by another from a common object (l 11). See also ib. l 6. pr.; § 1; l 11. For the *com. diu. iud.* see note above on l 6. § 1 (p. 50). The various modes of dividing a usufruct are given in D. X. 3. l 7. § 10 (cf. p. 47).

Quasi is very frequently used to denote an analogous relation, or liability,

or action; e.g. D. IV. 2. l 21. § 6 *Si metu coactus repudiem hereditatem, praetor mihi succurrit, aut utiles actiones quasi heredi dando, aut* &c.; I. 9. l 7. pr. *Emancipatum a patre senatore quasi senatoris filium haberi placet;* XXIII. 3. l 39 *Si serua seruo quasi dotem dederit* (where *quasi* belongs to *dotem*); XXIV. 1. l 32. § 27 *quasi meritus, quasi ad uxorem.* So the usufruct of consumable things was a *quasi usus fructus* (D. VII. 5. l 2. § 1); and some actions were *quasi ex contractu,* others *quasi ex maleficio* (XLIV. 7. l 5. § 1 sqq.). Cf. XV. 1. l 52. pr. *Qui tutelam quasi liber administrabat, seruus pronuntiatus est...Quia de peculio actio deficit, utilis actio in dominum quasi tutelae erit;* XLVII. 2. l 50. § 4, l 51 *Cum eo qui pannum rubrum ostendit fugauitque pecus, si praecipitata sint pecora, utilis actio damni iniuriae quasi ex lege Aquilia dabitur.* In the time of the formulary procedure such actions would be introduced by a fiction, cf. Gai. IV. 34—38.

uel stipulatione, &c.] Instead of an actual division of the usufruct, the Praetor might direct the disputants to enter into reciprocal agreements defining the mode of exercise of their respective rights. The same method is referred to as one which a *iudex com. diu.* might adopt. See D. X. 3. l 7. § 10 (given under *sociis* p. 47); and generally D. XLVI. 5. l 1.

ad arma et rixam] Disputes about the possession of land often led to armed force being used (cf. Cic. *Tull.* 9. § 21; *Caecin.* 8. § 22; Sen. *Dial.* 10. 3. § 1), which was severely dealt with by the Praetor. *Qui dies totos aut uim fieri uetat aut restitui factam iubet, qui de fossis, de cloacis, de minimis aquarum itinerumque controuersiis interdicet* (cf. D. XLIII. 19—23), *is in atrocissima re quid faciat, non habebit? et C. Pisoni domo tectisque suis prohibito per homines coactos et armatos, praetor quemadmodum more et exemplo opitulari possit, non habebit?* (Cic. *Caecin.* 13. § 36). Accordingly the Praetor in the case of *uis* gave an injunction to restore, provided the plaintiff had obtained possession *nec ui nec clam nec precario* from the other. In the case of *arma* or *uis armata* this proviso was omitted, so that the order to restore was absolute (Gai. IV. 154, 155). Justinian assimilated the first to the more severe interdict. See D. XLIII. 16; Vangerow, *Pand.* § 690 (III. p. 600 sqq.). A usufructuary could obtain this injunction *de ui et ui armata* (D. XLIII. 16. l 3. §§ 13—18).

§ 4. **causam proprietatis]** 'the position or rights of the (bare) owner'. For this sense of *causa* cf. D. II. 14. l 27. § 2 *Nec dicendum est deteriorem condicionem dotis fieri per pactum; quotiens enim ad ius, quod lex naturae eius tribuit, de dote actio redit, non fit causa dotis deterior* (it is found similarly interchanged with *condicio* in Gai. III. 126, 127); XXXII. l 30. § 3 *Si fundum mihi uendere certo pretio damnatus es* (i.e. by will) *nullum fructum eius rei ea uenditione excipere tibi liberum erit, quia id pretium ad totam causam fundi pertinet.* Where *causa omnis* has to be restored to a successful plaintiff, it is defined as all that he would have had, if the thing had been given up to him at the commencement of the suit. D. VI. 1. l 20; cf. l 17. § 1; XII. 1. l 31. pr.; XLIII. 16. l 1. § 31, &c. See above note on *restitutio* p. 47.

et aut fundi, &c.] This is the first of the species of usufructs which are discussed in order (see note on l 13. pr. *nam sicuti* p. 97). We ought to have subsequently *aut aedium* (§ 7), *aut domus* (§ 8), *aut mancipiorum* (l 15. § 1), &c.; but the turn of phrase is altered, *sed si aedium* (§ 7), *item si domus*, &c. Similarly in D. XXXVI. 1. l 38 (37). pr. (also from Ulpian) we have *aut re ipsa* followed by *sed et si* several times. Kühner, *Ausführl. Gram. Lat.* § 158 fin. gives like anacolutha from Cicero.

Further *aut fundi* is in fact the hypothesis or condition, to which the answer or apodosis is given by the words *et non debet;* just as in the next sentence *si forte* is answered by *non debebit.* This use of *et* is somewhat similar to its use in Verg. *B.* III. 105 *Dic quibus in terris inscripti nomina regum nascantur flores, et Phyllida solus habeto;* also *Geor.* II. 80 *nec longum tempus, et ingens...ad caelum arbos.* Cf. Dräger, *Hist. Synt.* § 311. 16 (II² p. 26).

arbores frugiferas] *Frugifer* is usually applied to land capable of producing *fruges*, i.e. corn, pulse, &c. (cf. Plin. *N. H.* XVIII. § 48). So in Cic. *T. D.* II. 5. § 13; Plin. *N. H.* XV. § 8 *Excepto Africae frugifero solo, Cereri totum id natura concessit;* Ov. *Met.* v. 656 *frugiferas messes* in connexion with Ceres. In *Off.* III. 2. § 5 Cicero says *cum tota philosophia frugifera et fructuosa, nec ulla pars eius inculta ac deserta sit*, the first epithet is taken from corn, &c., the other from vines, olives, apples (*poma*), &c. But *frugifer* is also used of trees; cf. Pseudo-Ov. *Nux* 19, where, after contrasting vines, olives, and apples with barren planes *Nos quoque frugiferae, si nux modo ponor in illis*, &c., and Plin. *N. H.* XII. § 14 says that cherries, peaches and others with Greek names are foreign, but that any of them that are now *incolarum numero, dicentur inter frugiferas.* In the table of contents in Book I. he says *Libro* XIIII. *continentur fructiferae arbores* (this book treats only of the vine); *Libro* XV. *continentur naturae frugiferarum arborum* (this book treats of olives, *poma* of all kinds, figs, cherries, &c.). So that the words must have been used somewhat loosely, as there seems to have been also a loose use of *frugem;* cf. D. L. 16. l 77 where however Mommsen suggests *fructum. Frugifer* occurs once more in the Digest XLIII. 24. l 16. § 1 *Si quis ui aut clam arbores non frugiferas ceciderit, ueluti cupressos, domino dumtaxat* (i.e. not to the fructuary as well) *competit interdictum.*

excidere] 'to cut to the ground' as opposed to clipping, cf. D. XLIII. 27. l 1.

diruere] 'to pull down', 'pull to pieces'; cf. D. XLVII. 3. l 1. pr.; XXXIX. 2. l 24. § 10.

in perniciem proprietatis] 'to the ruin of the (bare) owner's interest'. If we translated 'to the ruin of the property' the general meaning would be quite correct, just as *causam proprietatis* (just above) might be translated 'character of the property': only that property in England has come to mean the land itself instead of the right, as 'estate' in law means the legal right, in ordinary language, the land. *Proprietas* in Latin had not

thus become concrete. It meant the ownership, not the acres owned. But what injures the land as a desirable object injures the ownership.

uoluptarium] An estate for pleasant residence, as opposed to one worked for profit; in fact 'a residential estate'. *Uoluptariae impensae* are described in D. L. 16. l 79. See note above on l 7. § 3 (p. 66).

fuit] 'has been', i.e. before the legatee comes to it. The previous character of the object was a kind of standard for the use of the fructuary.

uirdiaria] 'greeneries', or small gardens or shrubberies in or close to a house. The word is spelt as here below § 7; D. XXXIII. 7. l 8. § 1; Lamprid. *Heliog.* 23; but *uiridiaria* in D. XXXIII. 7. l 26; Ulp. VI. 17; Plin. *N. H.* XVIII. § 7; Sueton. *Tib.* 60; *uiridaria* in Cic. *Att.* II. 3. § 2; Petron. 9. In Appendix to Prob. p. 199. 9 ed. Keil we find '*uiridis non uirdis*', in correction of what no doubt was a contraction in popular speech. See my *Lat. Gr.* § 245.

In D. VIII. 2. l 12 *uiridia* 'plants in pots' &c. on the top of a house are spoken of. Cf. D. VIII. 1. l 15. § 1; Plin. *Ep.* V. 6. § 17 *ambulatio pressis uarieque tonsis uiridibus inclusa*, i.e. with hedges clipped into different shapes; ib. § 38, § 40; Vitr. V. 9. § 5 *Media uero spatia, quae erunt sub dio inter porticus, adornanda uiridibus uidentur, quod hypaethrae ambulationes habent magnam salubritatem*, &c.; ib. VI. 6.

gestationes] 'alleys' in which a person was carried in a sedan, sometimes straight, sometimes running round a vineyard or shrubbery. Plin. *Ep.* I. 3. § 1; II. 17. § 14; V. 6. § 17; IX. 7. § 4. See Mayor ad Juv. I. 75 ed. 2.

deambulationes] 'walks'. The compound is in Ter. *Haut.* 806 used of the exercise, not of the place where the exercise was taken. The simple form *ambulatio* is often used for the place, e.g. Cic. *Q. F.* III. 1. § 1 *Nihil ei restabat praeter balnearia et ambulationem et auiarium;* § 5 *Topiarius omnia conuestiuit hedera, qua basim uillae, qua intercolumnia ambulationis;* III. 7. § 1 *Crassipedis ambulatio ablata* (by a flood); Varr. *R. R.* III. 5. § 9 *Circum huius ripas ambulatio sub dio, pedes lata denos;* Colum. I. 6. § 2; Vitruv. and Plin. *Ep.* cited in note just above. The preposition *de* in these compounds implies formally or methodically, cf. *decurrere*, of troops in a review; *declamare, denominare, denuntiare.* One who had only a *usus* was entitled to walk or be carried in the walks of the villa, *deambulandi quoque et gestandi ius habebit* (D. VII. 8. l 12. § 1).

deicere] 'throw down', applying both to the trees and any columns or structure which might surround or cover the walks, &c. So below § 5; VII. 6. l 2 *qui arbores deiecisset aut aedificium demolitus esset.* It may well here be understood to cover all disturbance of arrangements of a permanent nature.

hortos olitorios] 'vegetable gardens'. Cf. D. L. 16. l 198 *Hortos quoque, si qui sunt in aedificiis constituti* (among buildings), *dicendum est urbanorum* (sc. *praediorum*) *appellatione contineri. Plane si plurimum horti in reditu sunt, uinearii forte uel etiam holitorii, magis haec non sunt*

urbana. Columella x. 1. § 2, § 3 speaks of the rise of prices in meat having made vegetable gardens more important. Horace speaks of the substitution of flower gardens, &c. for vines and olive beds, *platanusque caelebs euincet ulmos; tum uiolaria et myrtus et omnis copia narium spargent oliuetis odorem fertilibus domino priori* (*Od.* II. 15. 4 sq.).

quod ad reditum spectat] 'which aims at a return', i.e. is laid out to produce what will sell rather than what will please the eye, &c.

§ 5. **lapidicinas**, &c.] See above on l 8. § 2 (p. 69).

instituere] 'set on foot', of mines and quarries, 'open'. Cf. Liv. XXXIX. 24 *Metalla et uetera intermissa recoluit et noua multis locis instituit.*

huic rei] must be taken with *occupaturus*, *necessariam* being absolute. 'If he has not to take for this purpose a necessary part of the land', i.e. a part necessary for the working of the land as it is already laid out, whether for vines or grain crops or other purpose. Agriculture did not include mining, nor even working stone quarries and sand pits (Varr. *R. R.* 1. 2. §§ 22, 23).

proinde] 'accordingly' 'wherefore', cf. l 15. § 5; l 25. § 2; D. IV. 1. l 6; &c. Gaius uses *proinde* only with *ac*, *ac si;* see note on l 20.

uenas inquirere] to discover beds of stone, strictly veins of (i.e. suitable for) stone quarries. For *inquirere*, cf. Gai. II. 44 *Cum sufficeret domino ad inquirendam rem suam anni aut biennii spatium.*

metallorum] See note on l 8. § 3 (p. 70).

sulpuris] used for medicine; also *ad lanas suffiendas, quoniam candorem mollitiemque confert...Habet et in religionibus locum ad expiandas suffitu domus* (Plin. XXXV. §§ 175—177).

aeris] 'copper', but the word was also used for compounds of copper, e.g. bronze, which is copper with tin. The Roman coinage was of copper with an average of 7 per cent of tin and 23 per cent of lead (Hultsch, *Metrol.* § 33. 5 p. 196).

quas pater familias instituit] 'which the master opened'. In this case the *paterfamilias* would be the testator or other creator of the usufruct. The term is apparently a conversational one to denote the owner or disposer. See above l 9. § 7 (thrice); v. 3. l 54. § 2 *Cum praedia urbana et rustica neglegentia possessorum peiora sint facta, ueluti quia uineae, pomaria, horti, extra consuetudinem patris familiae defuncti culta sunt;* XI. 7. l 4; XXXIII. 7. l 16. § 2; l 18. § 1; XXXV. 2. l 90; L. 16. l 203 where in defining slaves imported for one's own use, the question is put *utrum dispensatores... operarii quoque rustici qui agrorum colendorum causa haberentur, ex quibus agris pater familias fructus caperet, quibus se toleraret*, &c. are included; Cato, *R. R.* 2. § 1; Colum. IX. 1. § 3; Paul. *Sent.* III. 5. § 39; see also note on l 9. § 2 (p. 70); and the use of *dominus* in l 27. § 1.

si forte, &c.] 'if perchance there should be more profit to be got in this mine which he has opened, than in the vineyards and plantations and oliveyards which were there before'.

arbustis] *Arbustum* is chiefly used in connexion with vines, and means regularly planted rows of trees intended to bear vines. They often had

corn or other crops between the rows. Cf. Col. II. 2. § 24 *In Italia arbustis atque oleis consitus ager altius resolui ac subigi desiderat, ut summae radices uitium olearumque uomeribus rescindantur, quae si maneant, frugibus obsint.* The trees were chiefly elms and ashes, because their leaves were liked by cattle, but also poplars and maples (*opulus*). See Col. v. 6. Cato puts an *arbustum* last but one in the order of profit, the order being vineyard, garden, withybed, oliveyard, meadow, cornland, underwood, plantation, acornwood. See note on *silua caedua* l 10 (p. 77).

forsitan etiam haec, &c.] The difference of this case from that in § 4 is clear. In that section the fructuary of an ornamental estate is forbidden to convert it into an estate worked merely for profit. In this section a farm worked for profit is assumed: the fructuary is allowed to work mines previously opened, and even to open new ones, if it can be done without interfering with the regular farming of an estate. Then comes the question: what if the mines, if extended, should be more profitable than the farm continued as of old? Ulpian says somewhat doubtfully (*forsitan*) that possibly the transformation (partial or entire) of the estate from farming to mining may be allowed. The whole circumstances of the case would have to be weighed, and the act of the fructuary in changing the character of the estate, not from a residential estate to a profitable one, but from one mode of profitable working to another, may be justified. This interpretation seems to be confirmed by Bas. *δύναται δὲ συνιστᾶν ἐν τῷ ἀγρῷ παντοῖα μέταλλα, μὴ βλάπτων τὸν ἀγρόν· εἰ μὴ ἄρα μείζων ἐστὶ τῆς βλάβης ἡ περιποιουμένη πρόσοδος.*

There has been a great deal of discussion about the passage from early times, which may be seen in Glück IX. p. 239 sqq., and Vangerow, *Pand.* § 344, Anm. 2 (vol. I. p. 736). Both these writers understand the passage to relate to only a partial transformation of the estate, i.e. to a change of some portions of the estate from vineyard to mine. So also Elvers, *Serv.* p. 472, Wächter, *Pand.* § 154 (II. 233). I do not feel sure that the limitation to a part is necessary. That view seems to rest partly on a somewhat strained application of *salua substantia* in l 1 (which I take merely to distinguish a *ususfructus* from a *quasi-ususfructus*), and partly on applying here what Ulpian says only of a residential estate (supr. § 4). But very likely the partial transformation of an estate would be more easily justified than a complete change. Yet if an unsuspected bed of minerals were found and all the neighbouring estates were worked for that, an entire transformation might be what a *bonus paterfamilias* would do and approve. Nothing seems to be said of the course of obtaining the bare owner's consent. But that must have been possible, and might create an obligation: it would not affect the absolute legal rights. See note on l 15 fin. (p. 125).

si quidem] 'if, as is the fact', 'since'.

§ 6. **caelum corrumpant agri**] 'pollute the sky of the farm', i.e. vitiate the air, referring to smoke or chemical fumes. Cf. Lucr. VI. 1133 (of pestilence) *Nec refert utrum nos in loca deueniamus nobis aduersa et*

caeli mutemus amictum, an caelum nobis ultro natura coruptum deferat; D. XLIII. 23. l 1. § 2 *Nam et caelum pestilens et ruinas minantur inmunditiae cloacarum, si non reficiantur.*

I understand this as a limitation only so long as the estate is carried on as a farm, and to apply to the atmosphere of the particular estate only, not to land generally.

opificum] 'artisans' D. XXXIX. 1. l 5. § 3 *fabris uel opificibus;* L. 13. l 1. § 7 *ceterarum artium opificibus siue artificibus;* Cic. *Off.* I. 42. § 150.

legulorum] The inferior MSS. have *figulorum* which is certainly attractive, though possibly due only to conjecture. For *legulus* 'gatherer' cf. Varr. *L. L.* VI. 66 *ab legendo leguli qui oleam aut qui uuas legunt;* Cato *R. R.* 144 § 3 (of olive picking) *legulos quot opus erunt praebeto et strictores.* It is also found (see De Vit's *Lex.* s. v.) of goldpickers in an inscription found near Zalatna in Transylvania, *Corp. Inscr. L.* III. No. 1307 *Leguli aurariarum:* called *aurileguli* Cod. Theod. X. 19. l 9; l 12. The reference of the word here to goldpicking is old; see Glück IX. 245 n. *Murileguli* (pickers of *murex*) and *conchylileguli* are also spoken of in Cod. Theod. X. 20. l 5; l 16; l 17. But further if Ulpian's words (*quae instituit*) are taken generally to refer to any new arrangements set up by the fructuary, e.g. turning meadow into olive or vineyards (cf. Wächter, *Pand.* II. p. 233), and not merely to mines and quarries, *leguli* may perhaps be taken in its more usual application. The objections that I see to this are, first, that Ulpian's words more naturally relate to mines, and, secondly, that olive pickers, &c., are not a standing charge, but only hired for the harvest, and hired only in proportion to the crop, and therefore the charge is recompensed by the yield.

quae non potest sustinere propr.] So in the case of a mortgagee in possession D. XIII. 7. l 25 *Sicut enim negligere creditorem dolus et culpa quam praestat non patitur, ita nec talem efficere rem pigneratam, ut grauis sit debitori ad reciperandum.*

positurum] sc. *scribit Iulianus,* or something of that kind.

§ 7. **lumina immittere**] 'put in lights', i.e. make windows. Cf. D. VIII. 2. l 40.

colores] 'colours' with which the walls are stained. The pigments were mineral (Becker's *Gallus* ed. Göll, II. p. 303). See Vitr. VII. 7 sqq.; Plin. XXXV. § 29 sqq.

picturas] 'paintings' on and in the wall plaster D. XIX. 1. l 17. § 3 *Quae tabulae pictae pro tectorio includuntur, itemque crustae marmoreae, aedium sunt.* Cf. Plin. XXXV. § 116; Vitr. VII. 5.

marmora] marbles, i.e. slabs inserted in the walls, or flooring. Cf. Sen. *Ep.* 115. § 9 *miramur parietes tenui marmore inductos;* ib. 86. § 6. Fest. p. 242 *pauimenta Poenica marmore Numidico constrata significat Cato.*

sigilla] 'statuettes' or reliefs D. XIX. 1. l 17. § 9 *Item constat sigilla columnas quoque et personas et quorum rostris aqua salire solet, uillae esse.* Often made of plaster of Paris (Plin. XXXVI. § 183).

All these accusatives depend on *immittere* understood from the preceding clause, which will therefore refer to letting into the walls or fixing to them these pictures, &c. On the law see above l 7 fin.

si quid ad d. orn.] 'anything for ornamenting the house'. *Si quid* is used almost absolutely: *si quid...pertinet* would be the full construction.

sed neque] It is noticeable that this is not followed by another *neque* but by *uel...aut...uel...ue...uel*, &c. So in English we often use 'or', where 'nor' would be more strictly correct. The main particle here is *uel: aut* is used for the strong contrast of *coniungere* and *separare*, and *-ue* for the subordinate division of *aditus* and *posticas*. *Neque* here, I think, looks forward, not as frequently in these writers (e.g. *nec obstruere* below) backward. For the preceding sentence is affirmative (*sed et*).

diaetas] 'rooms', or 'suites of rooms' whether parlours or sleeping rooms. See Plin. *Ep.* II. 17. §§ 12, 15, 20, 24; V. 6. §§ 20, 21, 27, &c.; D. VII. 4. l 12; XXX. l 43. § 1; XXXII. l 55. § 3.

transformare, &c.] He is not permitted to change the rooms (i.e. to change the fittings so as to suit them for a different destination), or join them or separate them (i.e. remove or put up partywalls or doors).

aditus posticasue uertere] 'to reverse the front and back entrances'? But *aditum uertere* is used in Liv. XXXIX. 14. § 2 of turning the entrance of an upper story, so as to enter from inside the building instead of from outside. For *postica* comp. Hor. *Ep.* I. § 31 *Atria seruantem postico falle clientem.*

refugia aperire] 'to open retreats': apparently to throw open, by removing a roof or a wall, &c., some quiet concealed passage or room in the house. Noodt I. cap. 11 (referring to Casaubon on Spart. *Hadr.* 10) takes it of underground rooms and passages constructed to avoid the heat (cf. Plin. v. 6. § 30), or to avoid cold (Tac. *Germ.* 16). The word is used in D. XI. 3. l 2. § 2 (of harbouring other persons' slaves) *Est proprie 'recipere' refugium abscondendi causa seruo praestare uel in suo agro uel in alieno loco aedificioue*, but there it is not in a strictly concrete sense.

atrium mutare] By changing the hall is probably meant changing it from a simple construction of roof with cross beams to one with the beams resting on pillars of an ornamental kind, or *uice uersa*. Of four adjoining houses in Pompeii two have the simpler form (*atrium Tuscanicum*) two have an *atrium Corinthium*, one with 12 and the other with 16 pillars. Another change might be to have no *compluuium*, but the whole area to be roofed (*atrium testudinatum*); cf. Vitr. VI. 3; Hor. *Od.* III. 1. 45 *Cur inuidendis postibus et nouo sublime ritu moliar atrium?* See Marquardt, *Priv. Alt.* p. 232 ed. 2.

uirdiaria...conuertere] Mention is frequently made in the Latin writers of shrubberies or gardens close to or in a house (e.g. Hor. *Ep.* I. 2. 22 *Nempe inter uarias nutritur silua columnas*) and these would be susceptible of a great deal of change. See above under § 4 (p. 107).

excolere] 'improve'. Cf. below l 44, which lays down the same rule as

this. *Excolere* is also used of farms D. VI. 1. l 53; of a mountain pasture XIII. 1. l 25 *Saltum grandem, acceptum pignori, excoluisti sic ut magni pretii facias.*

quamuis lumina non obscurentur] 'even though the lights are not interfered with'. Probably this refers to neighbours' lights, but it may be that some lights in the house itself might be interfered with by raising part of the house higher.

quia tectum magis turbatur] sc. *uento;* 'because the roof is more liable to be disturbed'. So Glück IX. pp. 249, 250. Noodt I. cap. 11 takes it, wrongly I think, of an objection to disturbance with the roof-arrangements made by the owner.

quod Labeo, &c.] 'and this Labeo notices also in the case of the proprietor', viz. that he cannot raise the roof. So in l 7. § 1. The proprietor cannot make the position of the usufructuary worse (below l 16), but this is limited to direct alteration of the thing itself. An indirect interference is allowed, see l 30.

idem Nerua] 'the same Nerva', i.e. *Nerua filius.*

nec obstruere eum posse] 'that he (i.e. the fructuary) cannot block up lights either', i.e. the lights of the house of which he has the usufruct. Besides any structural change that this might imply, the non-use of lights for a certain time might free a neighbour from a servitude. Cf. D. VIII. 2. l 6 *Si aedes tuae aedibus meis seruiant ne altius tollantur, ne luminibus mearum aedium officiatur, et ego per statutum tempus fenestras meas praefixas habuero uel obstruxero, ita demum ius meum amitto, si tu per hoc tempus aedes tuas altius sublatas habueris. Obstruere luminibus* is used in Cic. *Dom.* 44; and metaphorically in *Brut.* 17. § 66; *Corp. Inscr. Lat.* I. 1252 *ius luminum obstruendorum redemerunt.*

§ 8. **domus**] At first sight this appears to be opposed to *aedium*, which was used at the commencement of § 7 and again lower down in that section. But *ad domus ornatum* was there used of the *aedes. Aedes* was originally in sing. 'a hearth', hence a single room, and thus appropriate to a temple: in plur. a set of hearths or rooms, hence a house. *Domus* is a dwelling, a residence, and is opposed to *insula* a house let out as lodgings; and in this character was perhaps chosen in our passage. See next note.

meritoria] sc. *cenacula* 'hired apartments'. Cf. Juv. III. 234 *Nam quae meritoria somnum admittunt: magnis opibus dormitur in urbe;* D. XLVII. 10. l 5. § 5 *Tantum igitur ad meritoria uel stabula non pertinebit lex Cornelia: ceterum ad hos pertinebit, qui inhabitant non momenti causa, licet ibi domicilium non habeant* (the *lex Cornelia* gave an action for forcible entry into a man's *domus.* Ulpian says it applies not only to one's home, but also to any fairly permanent residence; not to a transitory lodging); XVII. 2. l 52. § 15 of a man's lodging when travelling. See also a few lines below. The word is generally used of poor lodgings (cf. Val. Max. I. 7. Ext. 10 *in tabernam meritoriam deuertit;* Suet. *Uit.* 7 quoted in next note), and in later Latin of brothels, e.g. Spart. *Pescen.* 3. § 10 *Milites tui uagantur*

tribuni medio die lauant, pro tricliniis popinas habent, pro cubiculis meritoria. (See the lexx.)

nec per cenacula diuidere domum] 'not to divide it into suites of rooms'. Cf. D. XIX. 2. l 30. pr. *Qui insulam triginta* ('for 30,000 sesterces') *conduxerat, singula cenacula ita locauit* (*conduxit* F), *ut quadraginta ex omnibus colligerentur;* Suet. *Uit.* 7 *Tanta egestate* (*fuit*) *rei familiaris, ut, uxore et liberis quos Romae relinquebat meritorio cenaculo abditis, domum in reliquam partem anni ablocaret.*

atquin] 'but', the same as *atqui*. The form *atquin* is found in Cic. *Dom.* 5. § 12; *Phil.* x. 8. § 17 and frequently in the Digest (e.g. IV. 3. l 18. § 3; XII. 2. l 42. § 1) and Tertullian. See Neue, *Formenlehre* II. p. 802 ed. 2.

locare] One who had the mere *usus* could not let (D. VII. 8. l 8; l 11); the rent being regarded as a *fructus*. See note on *omnis fructus*, p. 54.

quasi domum] 'as a house'; i.e. he must not let it off into separate lodgings, nor for other purposes than that of a residence.

Quasi is here used without any *fictitious* assumption, or allegation, or analogy. So also not uncommonly, e.g. l 9. § 2; l 48; D. I. 16. l 7. § 2 *Cum plenissimam autem iurisdictionem proconsul habeat, omnium partes, qui Romae uel quasi magistratus uel extra ordinem ius dicunt, ad ipsum pertinent*, i.e. in the capacity of magistrates; XXIII. 3. l 5. § 6 *Si pater, non quasi pater sed alio dotem promittente, fideiussit et quasi fideiussor soluerit* (i.e. in the character of surety); ib. § 12; XXXVI. 1. l 61 (59) fin. *quia non quasi heres sed quasi mater ex pacto accepit;* XLVIII. 19. l 9. § 15 *si, posteaquam* (*decurio*) *plebeius factus est, tunc suscipiat filium, quasi plebeio editus, ita erit* (a criminal son) *plectendus.*

balineum] 'a public bath'. The distinction of *balneum* for a private bath, *balneae* for public baths is ante-Augustan only (Marquardt, *Priv. Alt.* p. 265). Rules for baths to be supplied by a contractor in a mine in Lusitania are contained in an inscription lately found (*Lex Metalli Vipascensis*, Bruns p. 141, ed. 4). The supply of baths *gratis* was one form of liberality, and sometimes the subject of an endowment, e.g. D. XXXII. l 35. § 3 *Codicillis confirmatis ita cauit: Tiburtibus municipibus meis... balineum Iulianum iunctum domui meae, ita ut publice, sumptu heredum meorum et diligentia, decem mensibus totius anni praebeatur gratis;* XXXII. l 91. § 4; XIX. 2. l 30. § 1 *Aedilis in municipio balneas conduxerat, ut eo anno municipes gratis lauarentur.* See inscriptions in Wilmanns' index s. v. *balneae* (II. p. 658). Baths for hire were also owned by private persons, e.g. Cic. *Or.* II. 55. § 223; Plin. *Ep.* II. 17. § 26 *In hoc uico balinea meritoria tria, magna commoditas, si forte balineum domi uel subitus aduentus uel breuior mora calfacere dissuadeat.* The great change involved in turning a dwelling-house into a bath-house is illustrated by the legal effect of the converse given in D. VII. 4. l 12. pr. *Si cui balinei ususfructus legatus sit et testator habitationem hoc fecerit, uel si tabernae, et diaetam fecerit, dicendum est usumfructum extinctum.*

On the spelling, see Ritschl *Opusc.* IV. p. 175 who says Plautus wrote *balineas* but *balneator*, if MSS. are to be trusted. Later writers used both forms *balneae, balineae; balneum, balineum* (Koffmane, *Lex.* p. 21).

quod autem dicit, &c.] 'when he (*Nerua filius*) says that the usufructuary will (i.e. must) not let rooms for hire, you must take him to mean, he must not make an inn or laundry (?) of it'. It might be allowed to have lodgers of a permanent character, but not to make it a common lodging-house for chance travellers.

For this use of *quod* to introduce a matter for remark, see my *Lat. Gram.* § 1749.

deuersoria] *deuerti, deuertere, deuersorium*, &c. (also written *diuers.* &c.) are used of putting up for a night, or short stay, either at a friend's house, or an inn. Cicero even speaks of buying a *deuersorium* (*Fam.* VII. 23. § 3). Cf. Varr. *R. R.* I. 2. § 23 *Si ager secundum uiam et opportunus uiatoribus locus aedificandae tabernae deuersoriae*, which he implies would be profitable. *Taberna deuersoria* also in Plaut. *Merc.* 436. *Deuersorium* is generally used of inns, which were poor, e.g. Auct. *ad Herenn.* IV. 51; Liv. XLV. 22. § 2 where Rhodian ambassadors complain *Antea ex publico hospitio in curiam gratulatum uobis, nunc ex sordido deuersorio, uix mercede recepti, uenimus;* Petron. 15; 124; Suet. *Uitell.* 7 *Uitellius per stabula ac deuersoria mulionibus ac uiatoribus praeter modum comis; Ner.* 38 *quae uulgo...appellant* means that the ordinary term for what Nerva alluded to under *meritoria* is *deuersoria aut fullonica.*

fullonica] sc. *loca* or *cenacula*, as a neut. plur. is only found here, unless the word as it occurs in several receipts recently found at Pompeii is correct, and not a mutilated or abridged form for *fullonicam* (as Mommsen and others take it). In other receipts *ob fullonicam* is written (Hermes XII. 121, 126; Bruns p. 219). In the *lex Metall. Uipasc.* we have *tabernarum fulloniarum.* Cato *R. R.* 10. § 5 enumerates among the necessary plant, of very various character, for an oliveyard 'one *fullonicam*'. Frontin. (*Aq.* 94) has *haec aqua non in alium usum quam in balnearum aut fullonicarum dabatur.* In Dig. XXXIX. 3. l 3. pr. it is said that a person *in cuius fundo aqua oritur, fullonicas circa fontem instituisse.* In these cases *lacuna* or *taberna* or *officina* 'a pit' or 'workshop' (cf. Plin. XXXV. § 143 *officina fullonis*) must be understood with the adjectives. (In Cato, Blumner, *Techn.* I. p. 161; Marquardt, *Priv. Alt.* p. 511 take it with *pila*, but this is probably wrong: a trough or tub seems more likely to be Cato's meaning.) Fullers were in the habit of standing and treading the clothes in the liquid to clean the stuff and make it closer. The adjectives *fullonius* and *fullonicus* seem to be used indifferently. Thus Plautus (*Asin.* 907) has *si non didicisti fullonicam* sc. *artem* (the edd. read *fulloniam* against the MSS.) and so also Vitruv. VI. *Prooem.* fin. Pliny has *ars fullonia* (VII. § 196); *creta fullonia* (XVII. § 46) &c.

For the whole of the passage *Item si domus—fullonica appellant* Bas. has simply this οὔτε ἀκρατοπώλια ἢ λοῦτρον ἢ ἐργαστήρια ποιεῖν· μισθοῦν

δὲ ὡς οἶκον δύναται. Heimbach and Zachariae de Lingenthal translate ἀκρατοπῶλια by '*meritoria*', I suppose in the belief that the Greek translators derived *meritoria* from *merum* 'pure wine'. Ἐργαστήρια seems to represent *fullonica*. But the use of *fullonica* here is somewhat strange: why select this as an instance of workshops? and why class it with *deuersoria*? and why this periphrasis with *uulgo appellant*?

et si balineum, &c.] 'even if there is, quite in the interior of the house or among pleasant rooms (i. e. not among back offices), a bath customarily reserved for the use of the owner'. Ulpian says that the mere existence of a bath in the house is no justification for altering the character of the house in the way alluded to.

dom. usibus uacare] So just below *iumentis et carruchis uacans. Uacare* in this use 'to be free from everything else, so as to be ready for a particular thing' is common (in the silver age) of persons and of the mind, e. g. Cic. *Diu.* I. 6. § 10 *Ego uero philosophiae semper uaco;* Quintil. XII. 1. § 4 *Ne studio quidem operis pulcherrimi uacare mens, nisi omnibus uitiis libera, potest;* Tac. *Ann.* XVI. 22 *Thrasea priuatis potius clientium negotiis uacauit:* rarely of things, e. g. Verg. *Aen.* XI. 179 *meritis uacat hic tibi solus fortunaeque locus:* nor is it frequent in this sense at all in the Digest, e. g. XVIII. 1. l 51 *Litora nullius sunt, sed iure gentium omnibus uacant,* 'free to everybody'; I. 13. § 2 *hi quaestores solis libris principalibus in senatu legendis uacant.* So Bas. takes our passage τῇ χρήσει τοῦ δεσπότου ὡρισμένον. It is possible to take *usibus* and *iumentis* as ablatives dependent on *uacare* 'empty of', i.e. 'not required for', 'not occupied by', but the sense is the same in either case.

ut publice lauet] Bas. ἐπὶ τῷ λούειν δημοσίᾳ. *Lauare* is used as well as *lauari* for bathing, e. g. Plaut. *Most.* 157; *Truc.* 322 *Pisces ego credo, qui usque dum uiuont lauant, minus diu lauare, quam haec lauat Phronesium. Si proinde amentur mulieres diu quam lauant, omnes amantes balneatores sient;* ib. 328, 330; Ter. *Eun.* 596 *Uentulum huic sic facito dum lauamur: ubi nos lauerimus, si uoles, lauato;* Varr. *L. L.* IX. 107 who mentioning both usages says *e (de?) balneis non recte dicunt 'laui'; 'laui manus' recte;* Liv. XLIV. 6 init.; common in Sueton., *Cal.* 24; *Ner.* 35; *Tit.* 8; *Dom.* 21; Lampr. *Com.* 11; Capitol. *Gord.* 6; Trebell. *Gallien.* 17.

But the impersonal use of *lauet* can only be paralleled by an inscription near Bologna (Wilmanns 2719) containing an advertisement: *In praedis C. Legianni Ueri balineum: more urbico lauat; omnia commoda praestantur;* and another quoted by Marini, *Atti* p. 532 *balineus: lauat more urbico et omnis humanitas praestatur* (Wilm. II. p. 209). These seem to justify the use in our passage. Otherwise we should have to read *lauent*, and compare *publice lauent* with *uulgo gratulantur* Cic. *T. D.* I 35. See my *Gram.* § 1428.

For *publice* cf. D. XXXII. l 35. § 3 (quoted above p. 113); l 91. § 4 *Balneas legatae domus esse portionem constabat: quod si publice praebuit, ita domus esse portionem balneas, si per domum quoque intrinsecus adirentur*, &c.

ad stationem iumentorum] 'for quarters for beasts'. Cf. Theod. Cod. VII. 16. l 2 *Omnes stationes nauium, portus, litora;* Vat. Fr. 134 *Arcari Caesariani in foro Traiani habent stationes. Statio* is often used of the quarters for soldiers, and of posting-stations. For *iumenta*, see note on l 3. § 1 (p. 39).

si stabulum, &c.] 'if he let out to a bakery, what was the stable of the house, reserved for beasts and carriages'. Bas. takes *domus* with *iumentis* τὸ στάβλον τὸ ἀφωρισμένον τοῖς ὑποζυγίοις τοῦ οἴκου καὶ τοῖς ὀχήμασιν.

Stabulum was the regular word for stalls or stables for animals; and their keepers or riders also put up there or in the same building. Cic. *Sest.* 5. § 12 *Pastorum stabula praedari coepit;* Plin. *Ep.* VI. 19. § 4 *Urbem pro hospitio aut stabulo quasi peregrinantes habent.* Paul. *Sent.* II. 31. § 16 *Quumque in caupona uel in meritorio stabulo diuersorioue perierint, in exercitores eorum furti actio competit;* D. IV. 9 *passim.*

carruchis] Elegant four-wheeled carriages (often) drawn by mules, first used in imperial times. Plin. XXXIII. § 140 *carrucas argento caelare inuenimus.* Alex. Severus permitted senators at Rome to have *carrucas argentatas* (Lamprid. *Al. Seu.* 43); Aurelian *dedit potestatem ut argentatas priuati carrucas haberent, cum antea aerata et eburata uehicula fuissent;* D. XXXIV. 2. l 13 *Quaesitum est, an carrucha dormitoria cum mulis, cum semper uxor usa sit, ei debeatur;* XIII. 6. l 17. § 4; XXI. 1. l 38. § 8; Paul. *Sent.* IV. 6. § 91. A stable reserved for a show equipage was not convertible to a bakery without a substantial change.

pistrino] The business of miller and baker was combined. The corn was pounded (*pisitur*), and then baked.

l 14. **licet multo minus**, &c.] 'though he got much less profit from the thing'. Haloander suggests *fructuum*, which seems necessary. The words are ambiguous in reference: is it the letting for a bakery, &c., that gives less profit, or the not letting? The latter is more probable, because the idea is simpler. A fructuary is not justified in a large change of the object by the fact that such a change would be much more profitable. For the house was meant for residence, not as mere material for profit. See above l 4 and l 5, which between them give the right rule.

l 15. pr. **sed si**, &c.] 'if however he have built any addition to the house, he cannot either remove it or break the attachment: what is actually unattached, he can no doubt claim as his own'. The principle of this is clearly expressed in D. XLI. 1. l 7, though there the position of owner is the reverse of our case. *Cum in suo loco aliquis aliena materia aedificauerit, ipse dominus intelligitur aedificii, quia omne quod inaedificatur solo cedit. Nec tamen ideo is, qui materiae dominus fuit, desiit eius dominus esse: sed tantisper neque uindicare eam potest neque ad exhibendum de ea agere propter legem duodecim tabularum, qua cauetur ne quis tignum alienum aedibus suis iunctum eximere cogatur, sed duplum pro eo praestet: appellatione autem tigni omnes materiae significantur ex quibus aedificia fiunt. Ergo si aliqua ex causa dirutum sit aedificium, poterit materiae domi-*

nus nunc eam uindicare et ad exhibendum agere. On *uindicare* and *ad exhibendum agere*, see note on l 12. § 5 (p. 92).

refigere] 'to unfix'. D. XLIII. 24. l 22. § 2; XLVIII. 13. l 10 (8). pr. Bas. has ἀνανεοῦν which corresponds to the reading of inferior MSS. *reficere.* But Steph. has ἀποσπᾶν (cf. Heimbach *Bas.* II. p. 184).

§ 1. **mancipiorum**] This is the third species of usufruct dealt with. See above on l 13. § 4 (p. 106).

usu fructu legato] I have written *usufructu* (suggested also by Mommsen) for *ususfructus* which the MSS. give. In the parallel sections l 13. § 4, § 7, § 8; l 15. § 4, § 5 we have *ususfructus legatus* (or *legatur*), not a genitive with *legatum sit:* the genitive *mancipiorum* dependent on a genitive *ususfructus* would be awkward; and *abuti legato sed secundum conditionem eorum uti* is again awkward. I take *usuf. legato* as ablative absolute, and understand *mancipiis* with *abuti* and *uti.* 'If the usufruct in slaves is bequeathed, the usufructuary ought not to spoil them by misuse'. But *abuti* and *uti* may be taken with *usufructu legato* as in l 27. § 2.

abuti] This word in classical Latin means (1) 'to use away from its original or intended or authorized use', and so far 'to misuse' (e.g. Cic. *N.D.* II. 60. § 151; *Att.* VII. 13 *b.* § 2); (2) 'to use to the full', 'use up', 'consume' (e. g. Cato, *R. R.* 76. § 4; Sall. *Cat.* 13. § 2). The 1st use is found in D. XV. 1. l 41 *Eo uerbo abutimur;* III. 5. l 37 (38) *licentia uidentur abuti;* Cod. Theod. XIII. 5. l 26 *legis indulto abutantur;* possibly in XI. 30. l 21 *ne moris tergiuersantibus abutantur.* But the 2nd use is much more frequent in the law writers; e.g. D. V. 3. l 25. § 11 *perdiderunt, dum re sua se abuti putant;* XXVII. 9. l 5. § 13 *pecunia abutantur* 'spend the money'; XLVIII. 20. l 6 med. *ea pecunia abuti* (though in both the last two places the 1st use is partly in mind); Cod. Just. V. 12. l 29 *fructibus abutatur.* I take it mainly in this last sense at the end of this section *abuti proprietate;* in § 4; in l 27. § 2, and in our present passage, though there is a mixture of both uses. It means 'to spoil by use', 'to destroy the proper character of the thing by the improper use made of it'. This is in accordance with the general principle of usufruct that it must not be destroyed in use (*salua rerum substantia*); with the reference in § 6 to the case of a quasi-usufruct; and with the regular meaning of *abusus* 'consumption in use', Cic. *Top.* 3. § 17 *Non debet ea mulier, cui uir bonorum suorum usumfructum legauit, cellis uinariis et olearíis plenis relictis, putare id ad se pertinere; usus enim, non abusus, legatus est;* D. VII. 5. l 5. § 1 *rerum quae in abusu consistunt* (i. e. money, corn, wine, &c.)=*quae in absumptione sunt* (ib.); ib. § 2; VII. 8. l 12. § 1; XII. 2. l 11. § 2; Ulp. *Fr.* 24. § 27. The Greek words ἀποχρῆσθαι, καταχρῆσθαι have similar double meanings.

condicionem] 'position', i.e. 'qualifications'. Cf. D. XXII. 5. l 3. pr. *In persona testium exploranda erunt in primis condicio cuiusque, utrum quis decurio an plebeius sit, et an honestae et inculpatae uitae, an uero notatus quis et reprehensilis, an locuples uel egens sit,* &c.; XLVII. 21. l 2; &c.

librarium] 'a copyist'. Cf. Cic. *Agr.* II. 5 fin. *Concurrunt iussu*

meo plures uno tempore librarii: descriptam ad me legem adferunt; D. XXXVIII. 1. l 49 *Ueluti si librarius sit, et alii patrono librorum scribendorum operas edat;* ib. l 7. § 5.

rus mittat, &c.] 'send him to the country (i.e. to farm work) and make him carry a basket and lime'. Cf. Hor. *Sat.* II. 7. 118 *Ocius hinc te ni rapis, accedes opera agro nona Sabino;* Sen. *Ir.* III. 29 *Si rusticum laborem recusat aut non fortiter obit, a seruitute urbana et feriata translatus ad durum opus;* D. XXVIII. 5. l 35. § 3. On the contrast between the work and habits of slaves in town and country see Colum. I. praef. § 12; ib. 8. §§ 1—4; Plaut. *Most.* Act I. Sc. 1. And compare the analogous differences between freedmen's services, D. XXXVIII. 1. l 16. § 1 *Tales patrono operae dantur, quales ex aetate, dignitate, ualetudine, necessitate proposito, ceterisque eius generis in utraque persona aestimari debent;* l 50. pr. *Operarum editionem pendere ex existimatione edentis: nam dignitati, facultatibus, consuetudini, artificio eius conuenientes edendas.*

qualum] Among the articles *fructus cogendi gratia* are mentioned *quali uindemiatorii exceptoriique in quibus uuae comportantur* (D. XXXIII. 7. l. 8. pr.). Cf. Verg. *G.* II. 241 *Tu spisso uimine qualos colaque prelorum fumosis deripe tectis;* Colum. VIII. 3. § 5; IX. 15. § 12. They appear to have been wicker baskets of a conical shape, used for collecting grapes, honeycombs, &c.

calcem] 'lime' used to make mortar. Vitr. II. 5.

histrionem—latrinis] 'if he make a pantomimic actor into a bathman, a member of a chorus of singers into a steward, or put an athlete to clean the privies'.

histrionem] A word with Etruscan root and Latin termination. Cf. Liv. VII. 2. § 6 *Uernaculis artificibus, quia 'ister' Tusco uerbo ludio uocabatur, nomen 'histrionibus' inditum,* the first players or rather stage-dancers having come from Etruria and been imitated by the Romans. D. XXXVIII. 1. l 7. § 5 *Impubis quoque est ministerium, si forte uel librarius uel nomenculator uel calculator sit uel histrio uel alterius uoluptatis artifex.* On the change involved in such an alteration of duties, see VII. 4. l 12. § 1 *Proinde et si histrionis reliquerit usumfructum, et eum ad aliud ministerium transtulerit, extinctum esse usumfructum dicendum erit.* The word was applied in the imperial times especially to pantomimic actors, i.e. actors who represented by dancing and gesticulation a dramatic situation, described in a lyrical poem, sung by a choir. (See Friedländer, *Sittengeschichte,* II. p. 420 sqq.: also in Marquardt, *Staatsverw.* III. p. 529.)

balneatorem] Mommsen gives, without noting any various reading, *balniatorem,* a spelling which I do not find elsewhere either in the Digest or other books. It is no doubt a specimen of the wrong spelling which occurred popularly in many words. See Brambach, *Lat. Orthogr.* p. 133 sqq. See below note on l 15. § 6 *doleis* (p. 122), and above l 13. § 8 *balineum* (p. 114).

de symphonia] This word appears to be used both of the music and of

the performers, much as 'chorus' is with us. For the second use, as here, cf. Cic. *Verr.* III. 44. § 105 *Cum in eius conuiuiis symphonia caneret, maximisque poculis ministraretur.* Such a chorus often accompanied a banquet.

The expression *de symph.* &c. seems to be short for 'withdraw from a chorus and make him a steward'. Cf. *de palaestra,* and *Lat. Gr.* § 1906.

atriensis was the name of a house servant, sometimes single, sometimes more, with lower or higher duties according to the establishment. In Plautus he is represented as receiving and paying money, concluding sales and purchases, and having charge of the provisions (Plaut. *Asin.* 347, 424 sqq.; *Pseud.* 608, 609). In Colum. XII. 3. § 9 the *uillica* amongst other things is charged *insistere atriensibus ut supellectilem exponant et ferramenta detersa nitidentur atque rubigine liberentur,* &c. And this latter function accords best with our passage where only inferior manual labours form a suitable contrast. So D. XXXIII. 7. l 8. § 1 *atrienses* and *scoparii* 'brushers' are classed together. (Cf. Marquardt, *Priv. Alt.* p. 140.)

de palaestra] '(taking him) from the wrestling school'. The exercises there are spoken of by Plautus *Bacch.* 428 as wrestling, boxing, running, leaping, and throwing the quoit, the spear, and the ball; Cicero (*Leg.* II. 15. § 38) speaks of the first three only. Gymnastic trainers (*palaestritae*) are mentioned among slaves in Mart. III. 58. 20; VI. 39. 9; Sen. *Ep.* 15. § 3. (Cf. Friedländer, *Sittengesch.* II. p. 445.)

stercorandis latrinis] Probably Brenkmann's conjecture (supported by Mommsen) *destercorandis* is right. *Stercorare* is 'to manure' the fields, &c. Comp. Plaut. *Curc.* 580 *tuas magnas minas non pluris facio, quam ancillam meam quae latrinam lauat.* On the *latrinae,* generally situated near the kitchen, see Rich, *Dict. Antiq.* s. v., Becker's *Gallus,* Excurs. I. to Sc. 2 (vol. II. p. 279, ed. Göll.).

abuti uidebitur proprietate] 'he will seem (i.e. be held by the arbitrator) to be using up and destroying the ownership'. *Abuti proprietate* is a somewhat peculiar expression here. It does not mean 'to misuse the ownership' for he has not the right to use the ownership at all, but to encroach on the rights of the owner and render them valueless by such a use or misuse of the slave. (In D. XXXVIII. 1. l 9. § 1 *proprietas* is apparently used for 'peculiar character'. *Officiales operae nec cuiquam alii deberi possunt quam patrono, cum proprietas earum et in edentis persona et in eius cui eduntur consistit* (*constitit* F). But this meaning can hardly be intended here, where *proprietas* is used by itself, and in a work where it is constantly used for 'ownership'.)

§ 2. **secundum ordinem et dign.**] 'according to the rank and worth of the slave', *ordo* referring to the position of the slave, which might be anything from the manager of large estates to the lowest menial; *dignitas* to the personal qualifications and conduct. See note above on § 1 *rus mittat* (p. 118).

§ 3. **generaliter**] 'generally', i.e. not in the case of slaves only, but of the whole class of moveables. So in Gai. III. 195; D. XII. 6. l 65. pr.; &c.

modum tenere] 'observe due moderation', 'keep within bounds'. On *modus* see above on l 9. fin. (p. 78). Cf. Hor. *Sat.* II. 3. 236 *Quae res nec modum habet neque consilium, ratione modoque tractari non uult*, and other passages quoted by Munro (*Criticisms, &c. on Catullus*, p. 225).

feritate] 'savageness'. Chiefly used of wild animals: but of men in Cod. Theod. VII. 16. l 3; v. 5. l 2.

corrumpat] see on l 13. § 2 (p. 104).

alioquin—conueniri] 'otherwise', i.e. if he do not use proper restraint, he is (i.e. can be) sued under Aquilius' act. For *alioquin* 'if it were not so', cf. Gai. III. 160; D. VIII. 3. l 23. pr.; &c.

For *lege Aquilia* see on l 13. § 2 (p. 99).

conuenire 'to sue' is frequent, e.g. D. III. 5. l 3. § 1 *Nam et mulieres negotiorum gestorum agere posse et conueniri non dubitatur;* ib. l 31. pr. *Ob eas res iudicio mandati frustra conuenietur, et ipse debitorem frustra conueniet:* also with the cause of the suit, not the person, for object, e.g. *dolus malus conuenietur* (D. XI. 6. l 1. § 1). The meaning is developed from the ordinary classical use of *conuenire*, 'to meet', 'visit'.

§ 4. **et si uestimentorum**] This is the fourth species of usufruct considered. A legacy of *uestis* or *uestimenta* included all articles of dress, couch-coverings, carpets and cushions, whether of wool, linen, silk, cotton, or skin, *Uestimentorum sunt omnia lanea lineaque uel serica uel bombycina, quae induendi praecingendi amiciendi insternendi iniciendi incubandiue causa parata sunt* (cf. D. XXXIV. 2. l 22—l 25. § 9).

non sic ut quantitatis, &c.] i.e. the usufruct discussed is the usufruct of certain dresses, not the usufruct of such and so many dresses. The first is a usufruct proper: the second a quasi-usufruct, recognised by a senate's decree and forming the subject of the fifth title of this book. In the first case the property in the dress or other articles did not pass to the usufructuary, and he must therefore exercise his right of using so as not to destroy the substance (above l 1, but cf. D. VII. 9. l 9. § 3). In the second case he became the owner, and might destroy or use as he pleased, subject to the obligation, secured by a bond, to replace the goods or their value at the expiration of the usufruct (D. VII. 5. l 2. pr.; l 7). The Institutes II. 4. § 2 give *uestimenta* among instances of things for a quasi-usufruct. Jhering (*Gesam. Aufsätze*, II. p. 445 sq.) contests the correctness of the above view: *contra* Windscheid, *Pand.* § 140, n. 2.

ita uti debere, ne abutatur] 'he should use them in such a way as to guard against wearing them out'. See above on § 1 *abuti* (p. 117). So Steph. clearly takes it, comparing it with the use of money. For *ita...ne* cf. *Lat. Gr.* § 1650.

ne tamen locaturum] 'the usufructuary will not however let them out for hire'. The nature of the article was the criterion whether a usufructuary could hire it out. Ordinary dresses are for wearing or using, not for hiring: stage dresses are obviously intended to be worn by many people, and hiring is therefore compatible with a proper exercise of usufruct.

uir bonus] i.e. a man desirous of exercising his right with due moderation and discretion. See above on l 9. pr. (pp. 67, 68).

§ 5. **scaenicae uestis...uel aulaei,** &c.] The singular is used collectively, as often in D. XXXIII. 2. See note on l 9. § 7, *palo* (p. 76). 'Stage dress or curtains, or other properties'.

et puto locaturum, &c.] The usufructuary will be entitled to let them out for hire, if a usufruct of such things be left him, generally: and further even though the testator only lent them and did not hire them, still the fructuary will be allowed to hire them out. Stage dress is evidently rarely of use to most persons, unless they can hire it out, and the difference between *usus* and *ususfructus* would come almost to nothing, if he could not take the 'produce' by letting them for hire.

commodare] 'to lend' a thing. It is opposed to *mutuum dare*, because the thing itself, not its equivalent, is to be returned (*mutuum damus, non eandem speciem quam dedimus—alioquin commodatum erit aut depositum—sed idem genus* D. XII. 1. l 2. pr.) and opposed to *locare*, because that is to grant the use of a thing for money, *commodare* is gratuitous (Just. III. 14. § 2. fin.). According to Labeo it was applicable only to moveables, but this view was not accepted (D. XIII. 6. l 1. § 1). See above on l 12. § 2, *precario* (p. 84).

ipsum fruct.] The force of *ipsum* is at first sight difficult to see. But *testator ipse* would not have surprised one; 'the testator himself' i.e. as opposed to his successor the fructuary. So *ipsum fruct.* is the fructuary himself as opposed to his predecessor the testator.

funebrem uestem] i.e. the robes and couch coverings required for the bier and train of mourners. Such things were probably often kept ready by undertakers and let out for the occasion. Black dress was mourning, though (Plut. *Quaest. Rom.* 26) in the imperial time women wore white (Marquardt, *Priv. Alt.* p. 346). Cf. Paul. *Sent.* I. 21. § 14 *Qui luget, abstinere debet a conuiuiis, ornamentis, purpura, et alba ueste.*

§ 6. **ita utentem, ne,** &c.] This expression is ambiguous. (1) Stephanus takes *eius* as the proprietor. 'The proprietor must not hinder the fructuary in his use, if it be so guarded as not to put the proprietor in a worse position'. With this use of *ita* qualified by *ne...faciat* compare *ita...ne abutatur* in § 4. (2) The German translator makes *eius* refer to the thing used. (3) Another mode would be to take *eius* of the fructuary and make the proprietor subject to *faciat*. Then *ita* would refer to the kind of use previously described by Ulpian as the proper one for the fructuary. 'The proprietor must not hinder the fructuary in such a use, lest by so hindering he put the fructuary in a worse position'. At the end of this law, taken with l 16, and in l 17. § 1 we have *ne deterior condicio fiat* expressly referred to the fructuary, and apparently presuming it to have been already stated. I am consequently inclined to this third view and to regard § 6 as commencing a new division of the subject by laying down a general rule for the proprietor corresponding to the general rule laid down for the fructuary

in l 13. § 4 *Fructuarius causam proprietatis deteriorem facere non debet, meliorem facere potest.* Then Ulpian proceeds to deal with doubts which have been raised on special points.

id faciat] i.e. hinder the fructuary.

doleis] supply *si eum uti prohibeat.* This spelling is found in two rustic calendars on sundials, *dolea picantur, Corp. I. L.* I. p. 359; in the best MSS. of Florus II. 8. § 13 (=III. 20), and of *Aetna* 267 (see Munro ad loc.), and in Nipsus, *Grom.* p. 296 ed. Lachm. It is disapproved by Charisius (I. pp. 70, 71 Keil), by Beda (VII. pp. 263, 270 Keil), and by Albinus (ib. p. 295); and approved by Probus App. (IV. p. 198 Keil). In other parts of the Digest we have *dolia*, e.g. XXXIII. 6. l 3; l. 6; 7. l 8; l 21; l 26 &c.: but in XXXIII. 6. l 15 the first hand of the Florentine MS. spells it with an *e*. So *labea* is found in Plaut. *Stich.* 721; Cato *R. R.* 20. § 2 and other places for later *labia* or *labrum*. The reverse change of *i* for a more usual *e* is found in *casiaria* D. VIII. 5. l 8. § 5 from *caseus;* and *balniatorem* above § 1.

dolia, seriae, cadi and **amphorae** ('tuns, butts, firkins and jars') were all earthenware vessels. *Dolia* were large and used for storing wine, oil, corn, &c.: they were sometimes big enough to hold a man; some vessels of this kind have been found large enough to contain 20, 30 or 36 *amphorae*. *Seriae* are often mentioned along with *dolia*, as used for the same purpose (Colum. XII. 28. § 3; Ter. *Haut.* 460). They were apparently smaller. A *cadus*, when used as a measure, contained 1½ *amphorae*. An *amphora* as a measure was equal to nearly 6 gallons. It was a two-handed jar usually small or tapering towards the foot. A **cuppa** was a wooden barrel, often mentioned with *dolia* (Marquardt, *Priv. Alt.* p. 627 sq.; Becker's *Gallus* ed. Göll. III. p. 418 sqq.).

etsi defossa sint] The *dolia* were often half buried in earth or sand in the wine-cellar. D. XXXIII. 6. l 3 *In doliis non puto uerum, ut uino legato et dolia debeantur, maxime si depressa in cella uinaria fuerint aut ea sunt quae per magnitudinem difficile mouentur: in cuppis autem siue cuppulis puto admittendum, et ea deberi nisi pari modo immobiles in agro, uelut instrumentum agri, erant;* ib. 7. l 8 *In instrumento fundi ea esse, quae fructus quaerendi cogendi conseruandi gratia parata sunt:...conseruandi, quasi dolia, licet defossa non sint, et cuppae.*

cuppis] Mentioned among things *quae exportandorum fructuum causa parantur* D. XXXIII. 7. l 12. § 1. The usual spelling is *cupa* Cic. *Pis.* 27 fin.; Cato *R. R.* 21; Plin. *N. H.* 23. § 63; Petron. 60; D. XIX. 2. l 31; but cf. D. XXXII. l 93. § 4.

cadis et amphoris] Cf. D. XXXIII. 6. l 15 *Uinum in amphoras et cados hac mente diffundimus, ut in his sit, donec usus causa probetur* (*prometur* Cujacius): *et scilicet id uendimus cum his amphoris et cadis: in dolia autem alia mente coicimus, scilicet ut ex his postea uel in amphoras et cados diffundamus uel sine ipsis doliis ueneat.*

idem et in spec.] sc. *putant.* 'The same is held to apply in the case of *specularia*'.

specularibus] 'window panes', in earlier times made of talc (*lapis specularis*), but later, at least in some cases, made of glass. Glass is found at Pompeii and Herculaneum in several houses and also at other places. Both were denoted by *specularia*. Sen. *Ep.* 95. § 25 *Quaedam nostra demum prodisse memoria scimus, ut specularium usum perlucente testa clarum transmittentium lumen;* comp. Lactant. *de opificio dei* 8. 11 *Et manifestius est mentem esse quae per oculos ea quae sunt opposita transpiciat, quasi per fenestras perlucente uitro aut speculari lapide obductas.* Also used for forcing plants, Col. XI. 3. § 52; Plin. XIX. § 64 (Marquardt, *Priv. Alt.* p. 735 sq.; Becker's *Gallus* ed. Göll. II. p. 315). In D. XXXIII. 7. l 12. § 16; § 25 it is held that *specularia* are to be regarded as part of the house itself, if they are fixed; part of the *instrumentum domus* if they are loose, but kept to repair breakages. Cf. Paul. *Sent.* III. 6. § 56.

sed ego puto, &c.] There were two principal questions in such legacies. (1) What is included under *fundus* (or under *domus*)? (2) What is included under *instrumentum fundi* (or *instrumentum domus*)? It was common to specify in a will *fundum* &c. *cum instrumento*, or *fundum* &c. *et instrumentum*, and these were two legacies, the *fundus* &c. being one, the *instrumentum* being another. Further *fundus* &c. *instructus* was held to include rather more than these (D. XXXIII. 7. l 12. § 27 sqq. but cf. l 5). In the case of a bequest of a usufruct Ulpian holds that the *instrumentum* is included under the mere word *fundus* or *domus*. This was doubtless because the estates or house could not well be used nor the produce taken without the *instrumentum*. It was otherwise in the case of the bequest of (the property in) a house or estate. There *fundus* or *domus* did not carry with it the *instrumentum* (D. XXXIII. 10. l 14), except so far as permanent fixtures were concerned. *Cum fundus sine instrumento* (without naming the stock) *legatus sit, dolia, molae oliuariae, et praelum, et quaeque infixa inaedificataque sunt, fundo legato continentur, nulla autem ex his rebus quae moueri possunt, paucis exceptis, fundi appellatione continentur* (ib. 7. 121)[1]. Possibly it was on this analogy that some denied the fructuary the right of using the barrels and jars, &c. On a sale of an estate, reserving the *fructus*, it was held that the *dolia* passed to the purchaser (D. XVIII. 1. l 40. § 5).

nisi sit contraria uoluntas] 'unless the intention be opposed to it', i.e. the intention of the testator in this case, in other modes of constituting a usufruct the intention of the contracting parties. For *uoluntas* cf. D. XXXII. l 50. § 4; § 6; Paul. *Sent.* III. 6. § 71; &c.

§ 7. The (bare) proprietor cannot impose a servitude on the estate of which the usufruct is in another, nor can he lose an existing servitude. Both acts would deteriorate the position of the usufructuary. But he can acquire a servitude. That is for the permanent improvement of the estate, and the usufructuary cannot prevent him, even if he wished. The usufruc-

[1] Paulus III. 6. § 34 is irreconcilable with this doctrine. See the editors. D. XXXII. l 93. § 4 is perhaps only apparently discordant with XXXIII. 7. l 4.

tuary cannot acquire a servitude for the estate, but he can retain one; and if one be lost by non-user on the part of the fructuary, the fructuary is liable, just as he would be, if he failed in any other way to uphold the property. As to the imposition of a servitude he has no power whatever: his consent even is of no avail to enable the proprietor to impose one—unless indeed it be a servitude which does not make the usufructuary's position worse.

Similarly the heir before constituting the usufruct cannot burden the estate by imposing servitudes or releasing servitudes, nor can he commit waste by cutting down trees or pulling down buildings, &c. (D. VII. 6. l 2).

imponere] regularly used of an owner subjecting his estate or house to a servitude in favour of a neighbouring one, e.g. D. VII. 6. l 2; VIII. 1. l 2; 2. l 17; 3. l 6; &c.

amittere seruitutem] Loss of a predial servitude could occur only (*a*) by non-use for the statutable time (see note on l. 5; Cod. III. 34. l 13); (*b*) by destruction (without subsequent restoration) of the dominant estate, e.g. a house (D. VIII. 2. l 20. § 2); (*c*) by confusion, i.e. by the owner of one acquiring the property in the other estate (D. VIII. 6 l. 1). For (*b*) and (*c*) the fructuary would have his remedy against the owner by vindication (D. VII. 6. l 1. pr.; XLIII. 25. § 4): for (*b*) also under the *lex Aquilia*, cf. IX. 2. l 12; and the interdict *quod ui* XLIII. 24. l 12. pr. As to (*a*) the duty of retention falls on the usufructuary; cf. D. VIII. 6. l 20; l 21.

The case of giving up a servitude is not included under *amittere*. The proper term for that is *remittere* (D. VIII. 1. l 6; l 14. § 1).

adquirere...etiam inuito fruct.] It does not appear in what way such an acquisition could impair the position of the usufructuary, and hence his unwillingness is disregarded. Whether he would be liable, if he lost such a newly acquired servitude, is not said.

quibus consequenter] 'in accordance with which'. The logic is, that, if the fructuary has no power to veto an acquisition, he has no power of himself to acquire one. The fact is the fructuary has no power permanently to alter the condition of the estate in any substantial manner.

retinere—tenebitur] The usufructuary being in *de facto* possession has the power, and from his general obligation to maintain the property he has the duty, of retaining rights belonging to the estate. Cf. l 12. § 2; § 3; 9. l 1. § 7; IX. 6. l 20. The fructuary can proceed against withholders of servitudes by claiming (*uindicando*) his usufruct against them. *Iulianus scribit hanc actionem aduersus quemuis possessorem ei* (i.e. *usufructuario*) *competere: nam et si fundo fructuario seruitus debeatur, fructuarius non seruitutem* (only the owner could do that D. VIII. 5. l 2. § 1) *sed usumfructum uindicare debet aduersus uicini fundi dominum;* cf. D. XLIII. 25. § 4.

proprietatis dominus ne quidem, &c.] This doctrine has seemed so strange to many writers that they have made all kinds of attempts to alter the passage or construe it otherwise than in its natural sense. See Glück, *Pand.* IX. p. 42 sqq. Modern writers have accepted the natural interpreta-

tion, but differed as to the mode of explaining the origin of the doctrine. Vangerow (*Pand.* § 338 n. 2. § 3) explains it as a refined consequence of the principle *seruitus seruitutis non datur* (D. XXXIII. 2. l 1. pr.). Others, from slightly different points of view, derive it from the fact that a usufructuary could not transfer his usufruct (see above note on l 12. § 2 p. 81), and therefore could not do what was in effect transferring part of the rights belonging to the usufruct; Keller (*Civil-Prozess* § 24 fin.) laying stress on the fructuary having no place in a formal surrender in court; Zachariae (*Z. G. R.* XIV. p. 133) suggesting that a formally established usufruct could only be impaired by a formal act, not by a mere consent (so Noodt I. cap. 15); but that, after the time when servitudes could be established by agreement, this rule became antiquated, and was taken into the Digest by mistake: Böcking (*Pand.* § 162 c. =II. p. 224) deducing this rule from the essential attachment of the usufruct to the person of the usufructuary. Similarly Arndts (*Pand.* § 179 n. 5, followed by Windscheid, *Pand.* § 203 n. 18) says "The *in iure cessio* of the owner alone could not establish a servitude: the *in iure cessio* of the usufructuary *qua nihil agitur* (cf. Gai. II. 30) could not remove the defect, any more than his informal consent could, and still less was an *in iure cessio* by both together conceivable", and adds that it is practically of no importance, mere agreement being now able to establish and put an end to servitudes, and, if strict form were insisted on, all that would be necessary would be for the usufructuary to surrender his usufruct and then after the establishment of the desired servitude receive it back again. The passage of Paulus which forms l 16 Arndts regards as unsuitably interpolated. Kuntze (*Excurs.* to § 541, p. 501) objects (1) that this explanation from the old *in iure cessio* only applies to formally constituted usufructs and yet there were many others, and (2) that it does not shew any ground which would not equally apply to innocent servitudes which yet were allowed (l 16). He holds that the value of the usufruct could not be reduced, for that would imply a partial alienation which was not allowed to a usufructuary: hence only such servitudes could be created which did not affect the value of the usufruct: these however could be constituted by the proprietor without the consent of the usufructuary. My own view would rather be expressed thus: there is no question here of the practical exercise of a servitude by agreement between the parties concerned, whether it be a positive or negative servitude, whether the usufructuary as a matter of fact allows his neighbour a right of road through his fields or refrains from blocking up his neighbour's lights. The question is, can a servitude be legally and permanently imposed on an estate, subject to a usufruct, by the owner, or by owner and fructuary combined? Now a servitude can only be created in strict law *in praesenti* (D. VIII. 1. l 4. pr.). The owner cannot do it *in praesenti*, for he cannot impair the position of the fructuary. The fructuary has a right to use and take produce; but he has no right of alienating the property or changing it in permanence. Consequently he cannot supply the defect

of power. (Comp. F. Schöman's view in Glück, p. 58.) While the usufruct lasts, the estate may be slightly modified or improved, but may not be deteriorated either by owner or fructuary. This being Ulpian's view, Paulus qualifies it only by suggesting that there may be servitudes which from their own nature may be imposed without impairing the thing for the fructuary, e.g. that he should not raise his house higher: for this is just what the fructuary is actually prevented from doing by the law of his position (l 13. § 7). It is possible enough that the stiff forms of the early modes of conveyance may have contributed to give this stiff unalterable character to a usufruct, but Ulpian's doctrine seems to be a deduction from the two rules that the proprietor may not impair the position of the fructuary, and that the fructuary is not to alter the character and position of the thing used. In l 13. § 5 no allusion is made to the possibility of consent. The discussion is directed to the right only.

ne quidem consentiente] This order (*ne quidem* coming together) is found above l 12. § 4; below l 25. § 5, and in Gai. I. 104; III. 93; Ulp. 23. § 11; § 13; D. XXXV. 1. l 15. § 2; XL. 5. l 53. fin.; XLI. 1. l 11; XLII. 3. l 4. § 1; 8. l 18; XLVI. 2. l 14. § 1; XLVIII. 10. l 7. The passages from Cicero and Livy quoted in Forcellini as supposed by some to contain instances, as he says, do not stand the test of good MSS., though there is some MS. authority for this order in Cic. *Caecin.* 13. § 37 (see Keller). The usual order *ne...quidem*, with the emphatic word interpolated, occurs in D. XII. 6. l 67. § 4; XXXI. l 11. pr.; XI. 4. l 55. pr.; L. 16. l 40. § 3; &c.

l. **16. uicino concesserit**] A praedial servitude must belong to an estate, and that estate must be a neighbouring estate; D. VIII. 5. l 2. § 1 *Seruitutem nemo (alius) uindicare potest, quam is qui dominium in fundo uicino habet, cui seruitutem dicit deberi* (cf. ib. l 38). It is not necessary, that the estates or houses, one of which serves the other, should be next to one another (ib. l 3).

For *concesserit* see note on l 12. § 2 (p. 81).

ius sibi non esse altius tollere] This servitude, viz. that a neighbouring house should not be raised, may be created in favour of any house. See D. VIII. 2. l 4; l 6; l 12, &c. Such raising might affect the dominant house by obstructing light, by obstructing prospect and by preventing the drip from the dominant house being received by the servient (cf. ib. l 20. § 5; l 21). A house, not servient to another, could be raised even though it thereby darkened the neighbouring houses (ib. l 9).

l. **17. locum religiosum facere**] Gai. II. § 4 sqq. *Sacrae res sunt quae diis superis consecratae sunt: religiosae quae diis manibus relictae sunt. Sed sacrum quidem hoc solum existimatur, quod ex auctoritate populi Romani consecratum est, ueluti lege de ea re lata aut senatus consulto facto. Religiosum uero nostra uoluntate facimus, mortuum inferentes in locum nostrum, si modo eius mortui funus ad nos pertineat.* Marcian, D. I. 8. l 6. § 4, adds *Sed et in alienum locum concedente domino licet inferre: et licet postea ratum habuerit quam illatus est mortuus, religiosus locus fit.* Ground that

was neither sacred, nor religious, nor hallowed (*sanctum*, e.g. city walls and gates), was called pure (D. XI. 7. l 2. § 4), i.e. not subject to restrictions on its use. (Compare the application of this term to unconditional legacies and stipulations, e.g. D. L. 16. l 10; XXX. l 91. § 1; &c.)

Even to the *Manes* a man could not give what was not in his own disposal. Hence the burial of a person did not make the spot religious, if a usufructuary (D. XI. 7. l 2. § 7), or one who had an easement in the place which would be interfered with by the grave (ib. § 8), or a joint owner (ib. l 41; X. 3. l 6. § 6) dissented. A usufructuary however could not validly object to the testator being buried in the ground subjected by him to the usufruct, if there was no other equally convenient place (XI. 7. l 2. § 7; cf. XXX. l 53. § 7). If an heir had not entered on the inheritance, still either he or any one could by burying the deceased in his (the deceased's) own ground make it religious (ib. l 4). One who without right placed a corpse in pure ground was bound by an action on the case either to remove the corpse, or to purchase the ground affected (ib. l 7). This action might be brought by the owner or usufructuary or easement-holder (ib. l 8. § 4). Even the owner of the ground could not dig up the body and remove it without the consent of the Priests (*pontifices*) or the Emperor. If he did, he was liable to an action for insult (*iniuriarum* l 8. pr.). See also D. XLVII. 12. l 3. § 4. Mere temporary deposit of a corpse did not make the place religious (l 40). The religious character extended only to the grave itself, not to land destined for graves (l 2. § 5); and graves of enemies were not *religiosa* to the Romans (D. XLVII. 12. l 4). Religious places could not be sold (Paul. *Sent.* I. 21. § 7; Cod. III. 44. l 2; l 9; cf. D. XI. 7. l 8. § 1; l 10).

Gaius' words, quoted above, *si modo eius mortui funus ad nos pertineat* are not adopted by Justinian, nor is (so far as I see) the condition found in the Digest. The persons to whom the *funus* belongs are (1) the person named by the testator, (2) the named heir, (3) in default of such, *legitimi uel cognati* in their proper order of succession (ib. l 12. § 4).

On family tombs and the right to be buried in them, see D. XI. 7. l 5; l 6; XLVII. 12. l 3. § 3; Cod. III. 44. l 4; &c., and Bruns, *Fontes*, Pt. II. § 13.

fauore religionis] Deviation from strict rule is often spoken of in favour of liberty, e.g. D. XXIX. 2. l 71. pr. *quod libertatis fauore introductum est;* XXVIII. 4. l 2. fin., XL. 5. l 24. § 10 *Nec enim ignotum est quod multa contra iuris rigorem pro libertate sint constituta;* ib. 7. l 20. § 3; Paul. *Sent.* II. 24. § 2; &c.; in favour of dowries, XXIII. 3. l 9. § 1 *Sed benignius est fauore dotium, necessitatem imponi heredi consentire ei quod defunctus fecit;* in favour of marriage, XXIV. 3. l 45. A leaning towards personal or equitable considerations is often denoted by *benignius receptum est* (XXI. 2. l 56. § 7); *benigna uoluntatis interpretatione* (XXXIV. 1. l 20. § 1); *propter utilitatem benignior iuris interpretatio facta est* (Gai. III. § 109); &c. See also Böcking, *Pand.* § 117.

finge enim] 'for suppose'. So often, e. g. D. VI. 1. l 38 (three times); XI. 7. l 4; XVII. 1. l 54. pr.; XXXVI. 1. l 13. § 3.

testatorem inferre] 'that he bury the testator', i. e. in the ground under usufruct. The same doctrine is laid down in D. XI. 7. l 2. § 7; and as regards a legatee ib. l 4; XXX. l 53. § 7. The burial of the testator is regarded as having a prior claim on the land to the usufructuary or to the legatee, just as the expense of the funeral was to be discharged out of the legacies if there was no other source (ib. l 14. § 1).

inferre is the regular expression for bearing to a place for burial. Cf. Nep. *Paus.* fin.; Suet. *Cal.* 15, &c.; D. XI. 7 passim.

cum non esset, &c.] 'there being no (other) place where he could be so conveniently buried'.

oportune] So spelt in D. XI. 7. l 2. § 7; l 4; XXX. l 53. § 7; *oportunitas* IV. 3. l 33; XI. 7. l 12. pr.; *oportunus* VII. 1. l 41. pr.; I. 15. l 3. pr.; XVIII. 2. l 4. § 6. But *opportunius* Gai. II. 97; *opportunitas* D. XII. 6. l 26. § 12; XXXVIII. 5. l 1. § 15. In Plautus the MSS. give *oportunitas Curc.* 305; *Men.* 137; *Merc.* 964, and J in *Epid.* 203 (these are all the Plautine passages); *oportunus* Ter. *Andr.* 345; *Eun.* 1077 in all MSS.; *Adelph.* 81; 267 in most (but not Bemb.); "the word occurs five times in Lucretius: in each case either both A B or one or the other write *oportunus*" (Munro on III. 545); *oportunus* Caes. *B. G.* III. 15. § 5; *oportunitas* ib. 17. § 7 (*opport.* Holder's B); *oportunitas*, Sall. *Jug.* 6 (in all MSS. ?). In Cicero the MSS. are divided. See Müller (who always writes *oportun.*) on *Rosc. Am.* 24. § 68; *Lael.* 6; Mayor, *Nat. D.* Vol. I. p. 52.

§ 1. **ex eo, ne,** &c.] 'in consequence of the rule that the proprietor must not impair the position of the fructuary, the question is often asked, whether an owner can correct his slave', i.e. a slave of which another has the usufruct.

coercere] Often 'to keep down, punish', e.g. Cic. *Or.* III. 1. § 4 *Pignoribus ablatis Crassum instituit coercere; Off.* III. 5. § 23 *Ciuium coniunctionem qui dirimunt, eos morte, exilio, uinclis, damno coercent; Legg.* III. 3. § 6; Cels. III. 18 ad fin. *Insaniens ubi perperam aliquid dixit aut fecit, fame, uinculis, plagis coercendus est;* D. II. 4. l 2 *Qui et coercere aliquem possunt et iubere in carcerem duci;* XXIII. 4. l 5. pr.; XXVI. 7. l 49; XLVIII. 19. l 28. pr. *Proxima morti poena metalli coercitio;* Coll. XIV. 3 *Sufficit eos uerberibus coerceri.*

plenissimam coercitionem] 'fullest power of punishment'. The ordinary right of an owner to punish a slave was not affected by another's having the usufruct of the slave, provided the punishment was inflicted without malice. The power over a slave was legally unlimited in the Republican period, and with some exceptions even till the Antonines. Cato major had a regular flogging time, viz., directly after meals, and had slaves put to death after a trial before the household (Plut. *Cat. mai.* 21). Horace (*Sat.* I. 3. 119) speaks of three instruments of beating, a rod (*ferula*, for which Plautus has *uirgae*), a leathern thong (*scutica* or *lorum*

or *habena*), and a whip of knotted ropes (*flagrum, flagellum*), or of wire with prickles (perhaps what Plautus meant by *stimuli*). Blows with the hand were common. Fetters for the hands feet and neck, often combined with work in a mill (*pistrinum*, or *ergastulum*), or stone quarries, are often mentioned in Plautus. See also Colum. I. 6. § 3; 8. § 16; Plaut. *Asin.* 549 sqq. with Lorenz on Plaut. *Pseud.* Praef. p. 52. Galen quoted by Marquardt speaks of runaway slaves having their legs cut off (cf. Cod. VI. 1. 13), thieves their hands, babblers their tongue (cf. Cic. *Clu.* 66. § 187). Runaways were often branded. Tortures of various kinds, and death by crucifixion, by fire, by exposure to wild beasts, are all spoken of. *Eculei et fidiculae et ergastula et cruces et circumdati defossis corporibus ignes et cadauera quoque trahens uncus, uaria uinculorum genera, uaria poenarum, lacerationes membrorum, inscriptiones frontis, et bestiarum inmanium caueae* (Sen. *Ir.* III. 3. § 6). *Cum in seruum omnia liceant, est aliquid quod in hominem licere commune ius animantium uetet* (Sen. *Clem.* I. 18). See generally Marquardt, *Priv. Alt.* pp. 175—184.

A *lex Petronia* (of uncertain age) and various senate's decrees forbade a master without official authority to give up a slave to fight wild beasts (D. XLVIII. 8. l 11. § 2). Claudius declared free all slaves abandoned as diseased (D. XL. 8. l 2; Cod. VII. 6. § 3). See Suet. *Claud.* 25; Dion Cass. LX. 29, who speaks also of masters being forbidden to kill their slaves. Hadrian is said by Spartianus (*Hadr.* 18) to have forbidden it. A SC. about 83 A.D. forbad the castration of slaves, and Hadrian repeated this (D. XLVIII. 8. l 4. § 2—l 6). Gaius (I. 53) and Ulpian (D. I. 6. l 2) name Antoninus (Pius) as having directed the provincial Governors in case of cruelty or outrage to slaves to compel the master to sell them absolutely; and that any one who put his slave to death should be punished just as if the slave had not been his own. The punishment was under Sulla's law (*Lex Cornelia de sicariis*) banishment (*deportatio*) to an island and confiscation of property, but in later times was death, except in the case of persons of rank (D. XLVIII. 8. l 3. § 5). The law was in general terms '*qui hominem occiderit*' with which compare Juvenal VI. 219 '*Pone crucem seruo*'. *Meruit quo crimine seruus supplicium? O demens ita seruus homo est? nil fecerit, esto: hoc uolo, sic iubeo, sit pro ratione uoluntas.* A law of Constantine's (A.D. 319) given in Cod. Theod. IX. 12. l 1; C. Just. IX. 14 *de emendatione seruorum* is worth quoting: *Si uirgis aut loris seruum dominus afflixerit aut custodiae causa in uincula coniecerit, dierum distinctione siue interpretatione depulsa multum criminis metum mortuo seruo sustineat. Nec uero inmoderate suo iure utatur, sed tunc reus homicidii sit, si uoluntate eum uel ictu fustis aut lapidis occiderit, uel certe telo usus letale uulnus inflixerit, aut suspendi laqueo praeceperit, uel iussione taetra praecipitandum esse mandauerit, aut ueneni uirus infuderit uel dilaneauerit poenis publicis corpus, ferarum uestigiis latera persecando, uel exurendo admotis ignibus membra aut tabescentes artus, atro sanguine permixta sanie defluentes, prope in ipsis adegerit cruciatibus uitam linquere saeuitia inmanium barbarorum.*

Another law A. D. 326 (Cod. Theod. ib. l 2) exempts from charge masters who in the correction of their slaves have *beaten* them so that they died. Cf. *Collat.* III.; Walter, *Rechtsgeschichte*, §§ 466—469.

Beating a slave did not entitle a fructuary to an action against the bare proprietor nor the proprietor to an action against a fructuary (D. XLVII. 10. l 15. § 37). If a third party beat the slave, the proprietor, rather than the fructuary, has a right of action (ib. § 47).

sine dolo malo] i. e. honestly, not maliciously; not creating a ground for punishing the slave in order to annoy or injure the fructuary, but inflicting a punishment *bona fide*. Cf. D. XX. 1. l 27 *Seruum quem quis pignori dederat, ex leuissima offensa uinxit, mox soluit: creditor minoris seruum uendidit*, on which Ulpian remarks *Si ut creditori noceret uinxit, tenebitur: si merentem, non tenebitur.*

dolus] 'craft' (not necessarily at first in a bad sense) is with *malus* constantly used both in laws, edicts and formulae, and also with and without *malus* in the ordinary language both of laymen and lawyers. It is used with two shades of meaning according to the opposed thought, viz., (1) 'wrongful', i. e. 'unlawful, intention', which corresponds to Eng. 'malice' as a law term, and is opposed to *casus, error, ignorantia, negligentia, culpa;* (2) trickery or fraud in dealings with another, leading to his pecuniary loss, and in this sense is opposed to *bona fides.*

The first sense is especially shewn in the common formula (*a*) *Sciens dolo malo. Lex Agrar.* (*C. I. L.* I. No. 198) line 10; 21; 61; *Lex Iul. Municip. C. I. L.* 206 (of unqualified senators) *ne quis eum in senatum ire iubeto sc. d. m.* (i. e. *sciens dolo malo*). *Lex Iulia et Pap. Popp.* (cf. D. XXIII. 2. l 44) *ne quis (senator) sponsam uxoremue sciens dolo malo habeto libertinam*, &c. *Sciens* is sometimes omitted without difference of sense, e. g. *lex Cornelia de sicariis* (D. XLVIII. 8. l 1) *Qui hominem occiderit, cuiusue dolo malo incendium factum erit...quiue falsum testimonium dolo malo dixerit quo quis publico iudicio rei capitalis damnaretur;* D. XLVII. 8. l 2; l 4 passim.

Similarly (*b*) the phrase *sine dolo malo* in our text refers to the absence of ill intention (cf. D. XI. 3. l 1); in *Lex Iul. Mun.* l. 40 (of charging a householder with the expenses of repairing the road) *Ei qui eam uiam tuendam redemerit tantae pecuniae eum eosue adtribuito sine d. m.*, it seems to be directed against the official's keeping back money from the contractor. Similarly D. XLII. 5. l 9. § 4; § 5; &c.

(*c*) One who wrongfully (*dolo* or *dolo malo*) has parted with the possession of a thing, or has prevented himself or another from being able to fulfil a duty, is as liable to the action, as if he were in possession or capable. See e. g. the Praetor's edict D. XLIII. 3. l 1. § 7 *aut dolo desiit possidere;* 2. l 1; 4. l 1. § 1; v. l 1. § 1. Similarly D. XLIII. 24. l 15. § 10 *Eum qui dolo malo fecerit, quo minus possit restituere, perinde habendum ac si posset;* IX. 4. l 21. pr.; § 2; &c.

Three other prominent uses are the following. (*d*) The *clausula doli*

or *doli mali* (D. XLV. 1. l 22; l 53; l 119; &c.), which gave a character approaching that of a *bonae fidei actio* to an action or a stipulation which contained it (Savigny, *Syst.* v. p. 495). It was in the words *dolum malum abesse afuturumque esse*, or *si huius rei dolus malus non aberit, quanti ea res est dari spondes* (D. XLVI. 7. l 19. Cf. XXXV. 3. l 1. pr.; VII. 9. l 5. pr.; Bruns, Pt. II. 1. 2. a; b; d).

(*e*) The *actio de dolo* (D. IV. 3), and (*f*) the *exceptio doli* (D. XLIV. 4). The *actio de dolo* was introduced by C. Aquilius in the time of Cicero who often mentions it; e. g. *Off.* III. § 50. Aquilius defined *dolus malus* as *cum esset aliud simulatum aliud actum*. Similarly Servius. Labeo blamed this definition because it made pretence (*simulatio*) necessary to ground the action, and all pretence wrongful. His own definition, approved by Ulpian, is *omnis calliditas fallacia machinatio ad circumueniendum fallendum decipiendum alterum adhibita* (D. IV. 3. l 1. § 2). The action was only granted, where there was no other action applicable. It was *famosa* (ib. § 4).

Cicero argues on the meaning of *dolus malus* in the speech *pro Tullio* 13, 14. Cf. Ulpian D. XLVII. 8. l 2. A large collection of passages is given by M. Voigt, *Bedeutungswechsel*, pp. 45 sqq., 89 sqq.; and see Pernice *Labeo* II. 60 sqq.

quamuis, &c.] Notwithstanding that the fructuary has limits put on his power of dealing with a slave, the proprietor is not so bound. So far the two are not on an equal footing, though the general principle *ne deteriorem condicionem alterius faciat* applies to both.

nec contrariis, &c.] 'the fructuary may not spoil a slave's trained capacity, by putting him to services which are contrary to his capacity and to which he is not used'. Ulpian evidently refers to what he has said in l 15. § 1 *si librarium rus mittat*, &c.

contrariis] Here used in reference to the contrasts set out in l 15. § 1. *Contrarius* is found absolutely in Cod. Th. VII. 1. l 4 *contraria corporis ualetudo*, 'bad state of health'; D. XXXVI. 14. l. 77 (75) *contraria fortuna*, 'bad fortune'.

ministeriis] 'services'. Cf. D. XXI. 1. l 65. § 2; XL. 9. l 12. § 1; &c. *Ministerium* is also used for a slave (=*minister*), D. VII. 8. l 12. § 5 *Si usus ministerii alicui fuerit relictus, ad suum ministerium utatur* (where both meanings are found).

artificium] 'quality as a craftsman', 'professional' or 'artistic skill', 'trained capacity'. Cicero speaks of an *artificium accusatorium* (*Rosc. Am.* 17. § 49), of a lawyer's *artificium* (*Fam.* VII. 13. § 2), of a doctor's (*Cluent.* 21. § 57). Cf. Cic. *Fin.* IV. 27. § 76 *prudentiam omnes, cuicunque artificio praesunt, debent habere; Off.* I. 42. § 150; D. XXXII. l 65. § 2 *Si unus seruus plura artificia sciat, et alii coci legati fuerunt, alii textores, alii lecticarii, ei cedere seruum dicendum est, cui legati sunt in quo artificio plerumque uersabatur* (i. e. If cooks are bequeathed to one, weavers to another, sedan-bearers to another, and one slave is trained in all these offices, he

will fall to the legatee who gets the class to which he most generally belonged); XII. 6. l 26. § 12; XL. 4. l 24.

corrumpere] Cf. l 66 and note on l 13. § 2 *aq. duct. corrumpi* (p. 104).

§ 2. **seruum noxae dedere**] (*a*) If an unemancipated child or a slave (or a tame animal) commits an injury for which, if he were *sui iuris*, he would be liable to an action, the father of the child, or owner of the slave (or animal), is liable either to make compensation for the damage, or to give up the offender to the injured party. The regular phrase used in this second alternative is *noxae dedere, noxae deditio.* In a few places in the Digest (IV. 3. l 9. § 4; IX. 4. l 17. § 1; l 22. § 3; l 28; XXX. l 53. § 4; XLII. 1. l 4. § 8; XLIII. 24. l 7. § 1; XLVI. 3. l 69) *dedit, dedisti, dedero, dedisset*, &c., are found instead of *dedidisti, dedidero*, &c., the similarity of the present *dedere* to the perfect (of *dare*), *dedi*, naturally leading to the mistake. (In Liv. XXII. 60. § 7 the best MS. has *dediderint;* inferior MSS. *dederint.*) But the constant use of such forms as *dedere, dedi* (infin.), *deditio, dedendi*, not *dare, dari, datio, dandi*, and the significance of the compound, leave no doubt of the true phrase[1].

(*b*) Another mistake is in taking *noxae* as a genitive[2] after *deditio.* This is at the root of Justinian's definition (*Inst.* IV. 8. § 1) *Noxa est corpus quod nocuit, id est seruus* (cf. Ulpian D. IX. 1. l 1. pr. *dari id quod nocuit; id est, id animal*, &c.), and of the expression, if it be not a mere copyist's blunder, *noxae dedendae* (for *noxae dedendi*), found in D. v. 3. l 20. § 5; IX. 1. l 1. § 16; XLII. 1. l 6. § 1 and perhaps elsewhere. A corresponding mistake, probably of the copyists, is *noxam dedere* in the Praetor's edict D. IX. 3. l 1. pr. (but *noxae dedi iubebo* in l 5. § 6), *noxam det* (D. XLIII. 24. l 7. pr. immediately after *noxae dedere* and before *noxae dedisset*), and *noxam dedere* Just. *Inst.* IV. 17. § 1. *Noxae* is an ordinary dative of the indirect object.

(*c*) *Noxa* is from *nocere*, and means 'harm', 'hurt', originally 'physical harm', but afterwards with a more general application. Harm done may be regarded from two sides, that of the injurer and the injured.

[1] *dare mancipio* is used (Gai. I. 140; IV. 79; cf. Just. IV. 8. § 7 *in noxam dare*) of the actual transfer and may have contributed to the mistake. The mistake is quite current among modern lawyers, and, if authority could make it legitimate, the authority of the following, all of whom, strange to say, occasionally speak of *noxae datio* or *dare*, would be more than ample: Arndts, Baron, Bekker, Bethmann-Hollweg, Böcking, Dirksen, Glück, Huschke, Karlowa, Keller, Krüger and Studemund, Kuntze, Long, Madvig, Mandry, Marezoll, Maynz, Mühlenbruch, Padelletti, Rein, Rudorff, Salkowski, Savigny, Scheurl, Schrader, Sell, Unterholzner, Vering, Voigt, Wächter, Walter, Wening-Ingenheim, Windscheid, Zimmern.

[2] Schrader ad *Inst.* IV. 8. pr. says it is for *noxae* (i. e. *damni*) *causa dedere.* This is not grammatically justifiable unless it be compared with *accusare, teneri, damnare*, &c., *Lat. Gr.* §§ 1324, 1327. But such an ellipse with a word like *dedere* should only be assumed in the absence of other explanation. *Ob noxam* is the phrase for this notion (see next note). Justinian perhaps took *noxae* as a predicative dative 'as a guilty object', but *dedere* is not otherwise so used, and *noxae* does not mean '*corpus ipsum quod nocuit*'. That *noxae* in this phrase is an indirect object seems to me certain.

In the same way its natural or legal consequence is satisfaction in some shape, either punishment to the injurer, or compensation to the injured. The old phrases appear to have been *noxam nocere*, 'to do harm', *noxam sarcire*, 'to make good the harm'. The first is found in Liv. IX. 10. § 9, where the Fetial surrendering Sp. Postumius to the Samnites says *Quandoque hisce homines iniussu populi Romani Quiritium foedus ictum iri spoponderunt, atque ob eam rem noxam nocuerunt, ob eam rem quo populus Romanus scelere impio sit solutus, hosce homines uobis dedo;* in a passage from Julian in D. IX. 4. l 2. § 1 *Si seruus furtum faxit noxiamue nocuit* (I assume *noxia* to be due to later writers), for which Pomponius writes *furtum fecit seruus aut noxam nocuit* (D. XXX. 1. 45. Cf. XXXV. 2. l 63. pr.). For this Gaius has *noxam committere* IV. 77, 78, &c. For the second phrase see Gell. XI. 18. § 8 *Pueros impuberes (furti manifesti prensos) praetoris arbitratu uerberari uoluerunt noxamque ab his factam sarciri;* D. IX. 1. l 1. § 11, where Q. Mucius is reported as saying that the owner of an animal, which unprovoked had killed another, *aut noxam sarcire aut in noxam dedere oportere* (cf. p. 141 n. and D. XLVII. 9. l 9 extracted from Gaius' work on XII. Tab.). One way to repair the loss of the injured person was to hand over the offender to him, which was expressed forcibly by *noxae dedere* 'to give him up to the harm'. So far *noxa* denoted only the harm done: but the harm done leaves the doer in fault and liable to make amends. And this other side of the fact is also expressed by *noxa* in some phrases, viz., *noxa solutus* 'free from fault' or 'guilt', or 'liability to make amends'; *noxa caput sequitur* 'the guilt or liability follows the agent'; i. e. the owner of the slave or other guilty party for the time being, though not the owner at the time of the offence, is liable to be called on to surrender him (Paul. *Sent.* II. 31. § 7—§ 9).

(*d*) *Noxa* is much confused with *noxia*. *Noxa* being 'harm', *noxius* would properly be 'harmful', 'guilty' (cf. D. XLVII. 6. l 1. pr.; Colum. III. 3. § 8), and *noxia* subst., 'harmfulness', 'guilt'. Accordingly *noxia* in Plautus and Terence, who often use *noxia*, never *noxa*, is 'fault', 'guilt'; e.g. *careo noxia* (*Bac.* 1005); *manufestum teneo in noxia* (*Merc.* 731); *Tranioni remitte hanc noxiam*, 'forgive Tranio this fault' (*Most.* 1169); *Sum extra noxiam* (Ter. *Hec.* 276); *Pueri inter se quam pro leuibus noxiis iras gerunt* (ib. 310). *Noxa* is in the same sense in Cato *R. R.* 5. § 1 *Si quis quid deliquerit, pro noxa bono modo uindicet*, and in Caecil. ap. Fest. p. 174 *Ista quidem noxa mulieris est, magis quam uiri.* Cicero has only *noxia*, *Rosc. Am.* 22. § 62; *Leg.* III. 4. § 11; 20. § 46 *noxiae poena par esto, ut in suo uitio quisque plectatur.* Livy has (according to Madvig's text) *noxa* 30 times, *noxia* 8 times, *noxa* generally, and *noxia* sometimes, meaning 'fault', 'crime', 'guilt', e.g. *reus haud dubius eius noxae* (V. 47. § 10); *neque de noxa nostra neque de poena rettulistis* (IX. 8. § 4); *adeo neminem noxiae poenitebat ut etiam insontes fecisse uideri uellent* (II. 54 fin.); though *noxiae* chiefly occurs (as predicative dative) in such phrases as *nihil eam rem noxiae futuram* (XXXIV. 19. § 5), where it may be taken as 'harm' and compared with

damno esse, instead of with *crimini esse* (cf. D. XVII. 1. l 48. pr.). In two places (XXXVI. 21. § 3; XLI. 23. § 14) *noxa* is used of mere 'harm', e.g. *sine ullius noxa urbis exercitus reductus*. Ovid has *noxa* 'harm' in *Fast.* VI. 130; *Met.* XV. 334; 'fault' in *Met.* I. 214; *Pont.* II. 9. 71. Manilius has *noxia* in the sense of 'guilt' II. 602; IV. 94; 418; *noxa* as 'harm' II. 480; 613; 857; 'guilt' II. 161; IV. 104. Celsus (e.g. V. 27. § 3; VII. 26. § 4) and Columella (e.g. *noxam capere* or *contrahere* or *concipere* 'to take harm' VI. 2. § 2; 27. § 8; XII. 3. § 7) have *noxa*, in the sense of physical harm. Pliny the elder has *noxia* and *noxa* frequently, perhaps always, in the lastnamed sense. Tacitus has *noxa* for physical harm in *Ann.* II. 6; XV. 34; for 'harm' in *Ann.* III. 73; and perhaps IV. 36; for 'guilt' in *Hist.* II. 49; and *noxia* 'guilt' in *Ann.* VI. 4. Suetonius has *noxa* for 'crime' *Aug.* 67; *Tib.* 33; 'harm' *Iul.* 81, and perhaps *Oth.* 10 (*ne cui periculo aut noxae apud uictorem forent*). Other lay writers have the words but rarely. See the large collection in Voigt's *Bedeutungswechsel*, p. 125 sqq.

(*e*) The notion that *noxa* meant 'punishment', supported by Festus p. 174, and Servius ad *Aen.* I. 41, is probably due to misunderstanding the expressions *noxae dedere*, *noxam merere*, *noxa solutus*, and possibly some others. But compensation, not punishment, is the aim of *noxae dedere*, compensation either in money or in the bodily labour of the delinquent. It was a civil, not a criminal, remedy. Nor is there any expression which requires such a meaning as punishment. *Noxam merere* (Liv. VIII. 28. § 8 *ne quis, nisi qui noxam meruisset donec poenam lueret, in compedibus aut in neruo teneretur: pecuniae creditae bona debitoris, non corpus, obnoxium*[1] *esset;* Petron. 139) like *noxiam commerere* (Plaut. *Most.* 1178 *quasi non cras iam commeream aliam noxiam;* cf. *merita noxia, Trin.* 1; 4), means 'to get guilt', i.e. 'commit a fault' or 'crime' (cf. *culpam merere*).

(*f*) *Noxia* is not very frequent in the lawyers. It occurs in *lex Rubr.* XXII. *obligatum eius rei noxiaeue;* D. IX. 1. l 1. pr.; 4. l 2. § 1; l 4. pr.; l 20; XVII. 1. l 48. pr.; XXI. 1. l 17. § 18; XXX. l 45. § 1; XLVII. 9. l 9; L. 16. l 238. § 3. In *Inst.* IV. 8 Justinian has in conformity with his theory substituted *noxia* throughout for Gaius' *noxa*.

(*g*) *Noxa* is very frequent in the lawyers, especially in the phrases *noxā solutus* and *noxae dedere*. The edict of the curule aediles prescribed *Qui mancipia uendunt, certiores faciant emptores, quid morbi uitiiue cuique*

[1] 'liable for the money lent', like *pecuniae iudicari, sponsionis damnatus*, &c., *Lat. Gr.* §§ 1324, 1325. *Obnoxius* is formed directly from *ob noxam* or *ob noxiam* (*Lat. Gr.* § 990), 'liable on account of harm done' (cf. Liv. IX. 10. § 4) hence generally 'liable', 'exposed'. Cf. Verg. *Aen.* 1. 41 *Unius ob noxam et furias Aiacis Oilei;* Liv. VII. 4. § 5; XXVIII. 28 fin.; Gai. I. 13 *Serui de quibus ob noxam quaestio tormentis habita sit et in ea noxa fuisse conuicti sint.* Liv. XXI. 30. § 3 is noticeable, *Indignati, quod, quicumque Saguntum obsedissent, uelut ob noxam, sibi dedi postularet populus Romanus. Ob noxiam* is in Plaut. *Poen.* 141; *Trin.* 1; 4; *Truc.* 834.

sit, quis fugitiuus erroue sit, noxaue solutus non sit (D. XXI. 1. l 1. § 1), i.e. sellers of slaves were to tell buyers what disease or defect each slave had which was a runaway or truant, or not free from guilt, i.e. who had committed some deed for which his owner had not made amends and for which consequently the purchaser, or any owner for the time being, would be called on to make amends or surrender him (D. XXI. 1. l 17. § 17). Accordingly a common covenant in the sales of slaves ran *Puellam sanam esse, a furtis noxisque solutam, fugitiuam erronem non esse praestari* (ap. Bruns, Pt. II. 11. 2, see also 1). Cf. D. XIX. 1. l 11. § 8; 4. l 2; XLVII. 6. l 3. pr., &c.; Sen. *Controu.* 21. § 23. A like covenant in the sale of animals is given by Varro *R. R.* II. 4. § 5 *Illasce sues sanas esse, habereque recte licere, noxisque praestari, neque de pecore morboso esse, spondesne?* (See above note on l. 9. pr. *recte* p. 68.) In Livy XXIII. 14. § 3 *noxa exsolui* is used of those who had committed criminal offences.

(*h*) *Noxae dedere* is found in Liv. XXVI. 29. § 4; Ov. *F.* I. 359; Colum. I. Prooem. § 3; D. II. 9. l 1; IX. 1. l 1. §§ 14, 15; 2. l 27. § 2; 4 passim; XXXIII. 8. l 6, &c. In an early state of society the claim of the injured party was very likely a claim for the surrender of the offender (cf. Bekker *Actionen* I. p. 186 n.). At least in state-action religious obligation took this direction (Liv. VIII. 39. §§ 10—15; IX. 8. § 4; 10. § 9 quoted above). But in Roman law, as we know it even from the time of the XII. tables, the obligation was to compensate pecuniarily the injured party: if the offender or his superior could not or would not do this, the offender was liable to be taken personally by the injured party and made to work off the debt or be sold in slavery (cf. Rudorff, *R. G.* II. §§ 89, 90). For freemen this mode of execution was altered subsequently: but in the case of slaves there was no such reason for alteration. If not defended, he was liable to be led off by the command of the Praetor and became the property of the plaintiff (*iussu praetoris ductus in bonis fit eius qui duxit* (D. II. 9. l 2; IX. 4. l 26. § 6). But the failure to defend the slave may be due to absence of those interested; and then, on proper cause being shewn, the owner, or in his default a usufructuary or mortgagee, is allowed to have the slave produced and the case to be tried (ib. also l 30). If the case be proved, the owner has the option of either paying the damages or surrendering the slave, which would be done in the regular form of conveyance (*mancipio* or *in iure cessione*, afterwards *traditione*). If the fructuary or mortgagee or a *bona fide* possessor defended, they could only deliver (*tradere*), but the plaintiff would be secured by being allowed a plea of fraud (*dolus malus*) against any attempt on the part of the owner to claim the slave, without satisfying the plaintiff (D. IX. 4. l 11; ll 27, 28). If the owner falsely denied possession of the slave or had fraudulently lost possession (*dolo desiit possidere*), he was deprived of the option and had to pay the damages. He was deemed to be in possession, if the slave was lent or deposited elsewhere, and even if he was pledged, provided the owner had money available to redeem him (ib. l 20, l 21). The plaintiff had the choice of enforcing his

right, either against the owner, if he had fraudulently lost possession, or against the actual possessor (l 24). Surrender of a slave once made frees the defendant from any further action for other offences of the slave at the suit of the same or other plaintiffs (l 14). But if, instead of surrendering the slave, the owner has preferred to pay damages, he remains liable for other offences (l 20). The slave's death before trial freed the owner in any case (l 26. § 4). If the offence charged was insult (*iniuriarum*), the defendant had the additional option of merely allowing the slave to be flogged (*uerberandum exhibere* D. XLVII. 10. l 17. § 4).

(*i*) If the owner or other defendant could have prevented the slave's offence and did not, he had no option of giving up the slave. The slave is then deemed to be merely the master's instrument and he, not the slave, is answerable, unless the plaintiff choose otherwise (D. IX. 4. l 4). The refusal of the option is expressed by *detracta noxae deditione*, or *sine noxae deditione*, as opposed to *cum noxae deditione* (ib. l 4; l 5; l 21. § 2; XXXIX. 4. l 1 fin.; &c.).

(*k*) A *filius familias* was allowed to defend himself (l 33). Justinian abolished *noxae deditio* in the case of children (*Inst.* IV. 8. § 7). They were held liable to the judgment if condemned for torts, and the father was only liable to the extent of the *peculium* (D. IX. 4. l 35). A slave (e.g. a *statuliber*) who became free after the offence was liable himself, but, if he were manumitted subsequently to the offence, the plaintiff could proceed against either master or freedman (l 14. § 1; l 15; l 24; Gai. IV. 77).

(*l*) The actions which are expressly mentioned as having this noxal character were *furti, damni iniuria, iniuriarum, ui bonorum raptorum* (Gai. IV. 76), *interdictum de ui* (XLIII. 16. l 1. § 15), *quod ui aut clam* (ib. 24. l 14), some actions *in factum* (D. IX. 3. l 1. pr.; l 5. § 6), *arborum furtim caesarum* (XLVII. 7. l 7. § 5), *de sepulchro uiolato* (12. l 3. § 11), and in some cases *doli mali* (D. IV. 3. l 9. § 4); and perhaps others.

(*m*) Liability of a slave (or others) to a criminal prosecution was not affected by this proceeding; cf. D. XLVII. 2. l 93; XLVIII. 2. l 12. § 4.

(*n*) A similar action was allowed against the owner, at the time of action, of a four-footed beast (not being *fera*) or other animal, if the beast without cause, except from its own wildness of nature (e.g. a kicking horse, a fierce bull or dog) caused damage directly or indirectly. (*Actio de pauperie* D. IX. 1.)

(*o*) Ulpian compares *noxae deditio* with putting a man in possession of a dangerous building for which the owner neglects to give security (D. XXXIX. 2. l 7. § 1; and note above on l 7. § 1 (p. 56). Just as in that case the man so put into possession eventually, if security is not given, obtains effective possession and ownership, so the man to whom the slave is surrendered is made owner (though not by continued possession, but by actual conveyance). A passage of Papinian in *Collat.* II. 3, tells us that a *filius familias* was not bound for ever. *Per hominem liberum noxae deditum si tantum adquisitum sit quantum damni dedit, manumittere cogendus*

est a praetore qui noxae deditum accepit. The same rule is extended to slaves by Just. IV. 8. § 3. But no mention of this is found elsewhere (unless *liberabitur* be so taken in D. VII. 4. l 27 on which see note below on l 34. pr. *si sub condicione*). It may be an alteration of Justinian's. See Mandry, *Familiengüt.* II. p. 617.

iure non peremit] 'does not destroy in point of law', i.e. the right of the fructuary is not put an end to, though no doubt the practical exercise of it is suspended. It is obvious that the claim of the injured party is as good against the fructuary as against the bare owner. If the fructuary retains the slave's services, how is the injured party to get any compensation? But a change in the proprietor of the slave does not of itself have any effect legally on the usufruct. The effect comes from the superior equity of the injured party. Cf. D. VII. 4. l 19 *Neque ususfructus neque iter actusue dominii mutatione amittitur;* IX. 4. l 27 (speaking of the present case) *Ususfructus etiamsi persecutio eius denegetur, ipso iure durat eo usque donec non utendo constituto tempore pereat.*

For the use of *peremit* in this sense cf. D. VII. 4. l 1. § 3; II. 9. l 1 fin.; XLI. 3. l 44. § 5 (quoted below); XLVI. 3. l 75, &c.; Gai. III. 21; IV. 58.

non magis quam usucapio prop.] 'any more than the acquisition by long use of the ownership destroys a usufruct created previously'.

usucapio] It is well to distinguish here clearly four things: (a) *usucapio rei*, (b) *usucapio seruitutis*, (c) *usucapio libertatis seruitutum*, (d) *amissio seruitutis non utendo.*

(*a*) The strictness and inconvenience of the old forms of conveyance was likely to cause much property to be for a time held on an insecure tenure. The defect was remedied by allowing uninterrupted possession of a moveable for one year, of landed property for two years, to give full rights (*ius Quiritium*) to a previously insecure tenure. But honest belief (*bona fides*) and an apparently lawful origin (*iustus titulus*) are essential conditions. Honest belief is necessary only at the time of acquisition: subsequent knowledge of the defect in title does not impair the process. A 'just title' is such as arises from actual purchase, gift, legacy. It was not a just title if a man thought he had purchased a thing, when really it was lent him, or thought it was left him as a legacy, when the testator really had not referred to it in his will at all. But it is a 'just title' if a man purchased it, although the vendor had no power to sell; or received it as a legacy when the testator had no property in it at all, or was still alive (D. XLI. 8). Acquisition by delivery when the thing ought to have been mancipated, and acquisition from a person whose own title was bad, were the cases in which usucapion was most often effective. Some things were excluded from its operation, e. g. sacred and public property, freemen, things stolen, or taken by force (Gai. II. 45 sqq.), a *fundus dotalis* (D. XXIII. 5. l 16; cf. Cod. V. 12. l 30). Moreover all provincial lands were excluded, and no foreigner was capable of acquiring anything by usucapion.

These last two limitations of usucapion were probably the cause of an

analogous institute being adopted. A plea (*exceptio* or *praescriptio longi temporis* or *longae possessionis*) was given to a possessor in good faith and with a good commencement of possession (i.e. *iustus titulus*). Its applicability to moveables was definitely enacted by M. Antoninus Caracalla (D. XLIV. 3. l 3; l. 9). The period, fixed apparently by some imperial decrees (D. XVIII. 1. l 76. § 1), was ten years if the contesting parties had been present, twenty if absent. Later on, not merely a plea but a right of action to recover property so possessed was granted (Cod. VII. 34). And claims of mortgagees as well as owners were extinguished by this lengthened possession without their being pressed (Cod. VII. 36).

Justinian no longer distinguishing between *res mancipi* and *res nec mancipi*, between Italian and provincial land, (Caracalla had made all freemen Roman citizens A.D. 211, D. I. 5. l 17), enlarged the period of usucapion and fixed the period alike for all immoveables at ten years *inter praesentes*, twenty *inter absentes* (defining presence, and absence, see above p. 44), and for moveables at three years. The possession of a predecessor in title was allowed in all cases to be counted in the period (Cod. VII. 31; 33. l 12). The words *usucapio* and *longa possessio* &c. are left in the law writers, but mean for Justinian the same thing.

A still longer period of 30 and 40 years was allowed by Justinian to give not only a plea against claims (as had been practised since Constantine) but also a right of action, provided only the possession had commenced in good faith. A lawful beginning was not necessary, and stolen things were (according to most jurists) not excepted.

(*b*) Servitudes, being incorporeal things, could not be established by usucapion (D. VIII. 1. l 14. pr.; XLI. 1. l 43. § 1; 3. l 10. § 1). Notwithstanding this, we find a number of passages in both Digest and Code in which an acquisition of servitudes (*longa consuetudine*, &c.) is spoken of as existing: D. VIII. 2. l 28; 5. l 10. pr. *Si quis diuturno usu et longa quasi possessione ius aquae ducendae nactus sit*, &c.; 6. l 25; XXXIX. 3. l 1. § ult.; XLIII. 19. l 5. § 3; Cod. III. 34. l 1; l 2. The action granted was however *utilis*, and the right must have arisen therefore under the practice of the courts. The origin of the right had not to be proved: it was necessary only that for so many years the defendant or claimant had used it and that the use had been neither by force nor stealth nor permission. *Sane et in seruitutibus hoc idem sequimur, ut ubi seruitus non inuenitur imposita, qui diu usus est seruitute neque ui neque precario neque clam, habuisse longa consuetudine uelut iure impositam seruitutem uideatur* (D. XXXIX. 3. l 1 fin). The cases mentioned are all rural or urban servitudes: but Justinian (Cod. VII. 33. l 12. § 4) expressly makes his regulative provisions for *longi temporis praescriptio* applicable to usufruct as well as to the other servitudes.

The apparent discrepancy between the passages which deny usucapion to servitudes and those which admit protection to long use is due to the nature of servitudes themselves. Possession, putting into possession, turning out of possession, gaining a right by continued possession, are all

conceptions based on facts applicable to things, but they are not except artificially applicable to rights of way, rights to unobstructed light, rights to support, and rights of using and taking the fruit. A right of way cannot be continually exercised, a right of light can only be shewn when a person interferes with it, a usufruct has to exist concurrently with the fuller right, dormant only for a time, of the owner of the thing. Yet in all these cases there is something analogous to possession, and that is the exercise of the right when the person entitled desires to exercise it. But such exercise, or power of exercise, is not strictly possession (cf. D. IV. 6. l 23. § 2 *fundi possessionem uel ususfructus quasi possessionem amisit*); and accordingly, as one aspect or the other is presented to view, writers deny or assert possession of such rights. The Romans denied the applicability of usucapion, but they were in equity eventually driven to protect it by long possession, just as they admitted a *iuris quasi possessio*, while they denied *possessio*, just as they spoke sometimes of *tradere usumfructum*, sometimes of *inducere in fundum fruendi causa*, and in some cases recognised the right of servitude-holders to interdicts for disturbance. Cf. D. VIII. 1. l 20; VI. 2. l 11. § 1; XLI. 2. l 52; XLIII. 16. l 3. § 13 sqq.; l 9. § 1; Savigny, *Besitz.* § 12.

One passage of the Digest (XLI. 3. l 4. § 28) says that a *lex Scribonia* (date unknown) abolished *eam usucapionem quae seruitutem constituebat, non etiam eam quae libertatem praestat sublata seruitute.* When, how long, and in what way usucapion was thus applicable to found a servitude we do not know. Unterholzner (*Verjährungslehre*, § 196=II. p. 135 ed. 2) aptly refers to Gaius II. 54 for an analogous case of an incorporeal right, viz. an *hereditas*, being once regarded as admitting of *usucapio*, though afterwards the view was abandoned.

(*c*) The passage just quoted from the Digest speaks of *usucapio libertatis seruitutis*, and instances a person, occupying under a servitude not to build higher, who, by building higher and keeping the house so built for the required time, establishes his freedom from the servitude. If he had done this only by permission (*precario*), the servitude would continue (D. VIII. 2. l 32. pr.; 4. l 17). All servitudes were lost by non-use, but urban servitudes were not lost unless this non-use was practically enforced by the servient party's maintaining continuously for the required period an obstruction. This arises from the nature of the servitudes themselves, which do not consist in discontinuous acts of the dominant party which have to be permitted by the servient, but in a continued state of light, prospect, support, drainage, &c., which require no series of acts by the dominant party to declare the existence of the servitude. See D. VIII. 2. l 6. Hence if the servitude is to be destroyed, continuous disturbance must be made by the owner of the servient tenement. Other servitudes, viz. rural servitudes and personal servitudes, might be destroyed in the same way by interference on the part of the servient party, for this interference, if submitted to, brought the dominant party into the same condition of non-

user, which mere neglect without challenge from the other party would do. The periods for gaining freedom from servitudes were the same as for losing by non-use.

(*d*) Non-use under the old law for a period of two years occasioned the loss of urban and rural servitudes: in the case of usufruct for a period of one year, if the thing was moveable: two years, if immoveable (Paul. *Sent.* I. 17. § 1, § 2; III. 6. § 30); Justinian brought them under his general rules for *longa possessio* Cod. III. 34. l 13; 32. l 16. See above note on l 5 *legitimo tempore* (p. 44).

usucapio proprietatis] This would be the same as *usucapio rei*. To gain the thing and the ownership of the thing are in the case of usucapion identical. But the usucapion of a thing of which another has the usufruct, is in effect the usucapion only of the reversion, and this as usual is here expressed by *proprietas*. Cf. Papinian D. XLI. 3. l 44. § 5 *Non mutat usucapio superueniens pro emptore uel pro herede quo minus pignoris persecutio salua sit: ut enim ususfructus usucapi non potest, ita persecutio pignoris, quae multa societate dominii coniungitur sed sola conuentione constituitur, usucapione rei non peremitur.* There *us. fr. usucapi non potest* does not refer to any abstract impossibility of acquiring a usufruct by a usucapion, but to an existing usufruct not being affected by a usucapion of the reversion (Unterholzner, *Verjähr.* note 614). In what way the continued possession by a usucapient of the ownership could practically take place and be in evidence, while a fructuary was *de facto* in possession, is a question of fact, dependent on circumstances.

quae post constitutum u. f. contingit] If the usucapion was complete before the establishment of the usufruct, the former owner could of course have no power to grant a usufruct. If the usufruct had been granted by stipulation, the usufructuary being ousted would have his remedy on the covenant against the promiser and his heirs; if it had been granted by will, then he would have his remedy *ex testamento* against the heir.

debebit plane denegari] i.e. by the court before whom a suit for the usufruct is brought. Cf. D. IX. 4. l 27 (Gaius) *Si noxali iudicio agitur de seruo qui pignoris iure tenetur, aut de eo cuius usus fructus alterius est, admonendi sumus, si creditor uel usufructuarius praesens defensionem suscipere noluerit, proconsulem interuenturum et pignoris persecutionem uel usus fructus actionem negaturum. Quo casu dici potest ipso iure pignus liberari (nullum enim pignus est cuius persecutio negatur): usus fructus autem, etiamsi persecutio eius denegetur, ipso iure durat eo usque, donec non utendo constituto tempore pereat.* If the plaintiff's claim was not settled by surrender of the slave, and damages were assessed, the usufructuary was compelled (*per praetorem id consequar ego dominus proprietatis*, &c.) to pay his share proportioned to the value of his usufruct, or to give up the usufruct to the proprietor (ib. l 17. § 1). The plaintiff in the noxal suit need not wait for the fructuary or mortgagee to evict

him: he has by the judgment a right to the damages or to the full ownership of the slave, and can thus force the proprietor, if he prefer to surrender the slave, to surrender him free from usufruct or mortgage. To obviate a further suit by the proprietor against the usufructuary or mortgagee the Praetor deals with the rights of all parties (D. XLVI. 3. l 69).

persecutio] A general term for a suit, i.e. legal proceedings for 'following up' one's right. It is especially used where *actio* or *petitio* are not so suitable, e.g. D. XX. 1. l 17 *Pignoris persecutio in rem parit actionem creditori*, i.e. an *actio in rem* is the proper proceeding: XIII. 1. l 7. § 2 *Condictio rei furtiuae, quia rei habet persecutionem, heredem quoque furis obligat* (as opposed to a mere claim for damages); of *fideicommissa*, Gai. II. 282 *Si legatum per damnationem relictum heres infitietur, in duplum cum eo agitur: fideicommissi uero nomine semper in simplum persecutio est;* D. L. 16. l 178 *Persecutionis uerbo extraordinarias persecutiones puto contineri, ut puta fideicommissorum, et si quae aliae sunt quae non habent iuris ordinarii exsecutionem.* Hence it is added to *actio* and *petitio* in the Aquilian stipulation (D. XLVI. 4. l 18). But it is also used synonymously with *actio* and *petitio*, e.g. of the *operae libertorum* (XXXIX. 1. l 2; l 4. § 4; but *actio* § 5; *petitio* § 9), &c. The three are thus distinguished by Papinian in D. XLIV. 7. l 28 *Actio in personam infertur: petitio in rem: persecutio in rem uel in personam rei persequendae gratia. Persequi* corresponds to *persecutio*, e.g. Gai. II. 278; IV. 6—9.

noxae accepit] *accepit* is the converse of *dedidit*. A fuller phrase is used by Papinian, *Coll.* II. 3, *qui noxae debitum accepit.*

litis aestimatio] 'the valuation of the suit' (Gai. IV. 94) i.e. 'the damages ascertained by the suit'. Whatever the nature of the suit, whether to establish a right, to recover an article of property, to get compensation for a breach of contract, or for a tort, the condemnation was always for the defendant to pay so much money to the plaintiff. In actions for torts committed by slaves or children in power, or beasts, the surrender of the offending animal was an alternative course open to the innocent owner to take. The precise way in which this alternative was introduced into the formal proceedings has been disputed. Possibly the formula may have been drawn up by the Praetor with the condition, '*nisi Numerius Negidius* (defendant) *Aulo Agerio* (plaintiff) *Damam seruum noxae dedat*'. But the extract from the edict given in D. IX. 3. l 1. pr. seems clearly in favour of the condemnation in the formula being expressly in the alternative[1]. Thus Rudorff (*Edict.* § 69) gives as the formula in a noxal action for a tort under the *lex Aquilia: Iudex esto. Si paret illum Aulo Agerio seruum ab illo seruo Numerii Negidii iniuria occisum esse, quanti is homo in eo anno plurimi fuit, tantae pecuniae in duplum*

[1] O. Lenel (*Ed. Perp.* p. 154) thinks (with good reason) that the noxal clause is actually given in D. IX. 1. l 1. § 11 *Quam ob rem aut noxam* (*noxiam* Lenel) *sarcire aut in noxam dedere oportet*, but puts it in the *intentio* of the formula.

aut noxae dedere iudex Numerium Negidium Aulo Agerio condemnato: si non paret absoluito (cf. D. ib. l 5. § 6; XLVII. 2. l 42. pr.). Then the judge having heard the case and ascertained that the slave was guilty, gave the defendant the option. If the defendant declined to give up the slave, the judgment would be pronounced no longer in the alternative but for the ascertained damages, which the plaintiff would proceed to enforce by bringing an action on the judgment. The law still gave the defendant the chance of avoiding this payment by surrendering the slave, but only till issue was joined. After that he must pay the damages. This view accords with the following two passages: D. v. 3. l 20. § 5 *Tamdiu quis habet noxae dedendae* (should be *dedendi*) *facultatem, quamdiu* ('until') *iudicati conueniatur; post susceptum iudicium non potest noxae dedendo se liberare;* XLII. 1. l 6. § 1 (a stipulation couched in the alternative either to pay ten guineas or to give up a slave must be sued on in the alternative and not merely the ten guineas claimed) *At iudicium solius noxae deditionis nullum est sed pecuniariam condemnationem sequitur. Et ideo iudicati decem agitur* (suit on the judgment is brought for ten guineas), *his enim solis condemnatur: noxae deditio in solutione est quae e lege tribuitur.* The decision of the judge referred to in *Inst.* IV. 17. § 1 I take to be the preliminary decision (*pronuntiatio* cf. Bethmann-Hollweg, II. pp. 240, 624) by which an option was expressly given to the defendant. (Vangerow, *Pand.* § 689 n. 2, takes *condemnatio* in D. XLII. l. c. of the formula, and refers *Inst.* IV. 7 to the actual final sentence. So at least I understand him.)

offeratur a fructuario] See above note on *debebit plane denegari* (p. 140).

§ 3. **utilem actionem**] *Utilis* was a term very frequently given to actions allowed by the Praetor in circumstances, which did not come within the strict letter of a statute, but were analogous to those which did. *Utilis* is opposed to *directa actio* (e.g. D. IX. 2. l 13. pr.) and means 'practicable', 'available'. The formula to the judge in such cases often took the shape of a fiction, i.e. a *bonorum possessor* was to be treated by the judge as if he were *heres;* or a man who had delivery of a thing on a just title and had lost the possession, is to be treated as if he had already gained the full ownership by usucapion: or a foreigner is allowed to sue for theft or other tort, as if he had been a Roman citizen (Gai. IV. 34—38). In other cases the facts justifying the action were set out in the formula and the judge directed to find accordingly. *Actio in factum* is the term then used. But the terms are not at all opposed to one another: indeed the same case is often spoken of under the name of *act. utilis* and *act. in factum.* Compare D. IX. 2. l 9. § 3 or l 53 with XLVII. 2. l 50. § 4; l 51; and IX. 2. l 9. § 2 or l 29. § 7 with XLVII. 8. l 2. § 20. See note on l 13. § 2 *lege Aquilia* (p. 99). For instances of *utiles actiones* cf. D. XIX. 1. l 13. § 25 *ad exemplum institoriae actionis;* XXXVI. 4. l 5. § 21 *exemplo pigneratitiae actionis;* XXXIX. 1. l 3. § 3; XLIII. 18. l 1. §§ 6—9, &c.; *utile interdictum* XLIII. 8. l 2. § 39.

So *Superficiarium et fructuarium damni infecti utiliter stipulari hodie constat* (D. XXXIX. 2. l 13. § 8 i.e. can stipulate though not strictly entitled to demand it); *de dolo utiliter replicari posse* (D. II. 14. l 35 fin.).

fructuario dandam] The same is laid down in D. IX. 2. l 11. § 10: and even applies if the slave has been killed by the proprietor (ib. l 12). Similarly a *bonae fidei* possessor and a mortgagee have an *actio in factum* against the proprietor (ib. l 17). The proprietor has a direct action against the usufructuary under the *lex Aquilia;* see above l 13. § 2; l 66.

l 18. **demortuarum arborum**] 'that have died off'. The word is frequently and properly used of a death which leaves a place that has to be filled, e.g. Cic. *Verr.* IV. 5. § 9 *Sanxerunt ne quis emeret mancipium, nisi in demortui locum:* Liv. XXIII. 23. §§ 4, 5 *inde primos in demortuorum locum legit;* so of a vine, Colum. III. 16. § 2; of animals, below l 70; of persons, *succeditur in ius demortui,* D. XXXVII. 1. l 3. pr. Trees blown down, without fault of the fructuary, he is not bound to replace (l 59. pr.). These latter are not part of the ordinary wear and tear of the estate like the former, but attributable to extraordinary disaster. And the duty of the fructuary is *modica refectio* only (l 7. § 2). Trees dying from age are taken by the fructuary as a kind of produce; trees blown down belong to the proprietor (l 19. § 1), unless the usufructuary requires them for the repair of the homestead or other proper use (l 12. pr.). *Arbores in locum mortuarum reponere* is a necessary expense on a dowry estate, and according to the circumstances will or will not entitle the husband to compensation (D. XXV. 1. l 14; l 15).

l 19. pr. **insulam**] A detached block, containing a number of rooms or sets of rooms (*cenacula* Varr. *L. L.* V. § 162, flats, apartments, 'suites') let to different persons. Such were usually occupied by poorer persons. Paul. *Epit. Fest.* p. 111 Müller. *Insulae dictae proprie, quae non iunguntur communibus parietibus cum uicinis, circuituque publico aut priuato cinguntur; a similitudine uidelicet earum terrarum quae fluminibus ac mari eminent suntque in salo.* The suites of rooms sometimes had stairs from the street; see note on l 13. § 7 *aditus* (p. 111) and D. XLIII. 17. l 3. § 7. The *insulae* appear not to have had more than four stories. The porters were *insularii* (D. I. 15. l 4; VII. 8. l 16. § 1). The lodgers were *inquilini.* The legal relation between owner and lodger was usually that of letting and hiring (D. XIX. 2. l 19. § 4—§ 6; l 25. § 2; l 27; l 30. pr., &c.; XIII. 7. l 11. § 5), but a man may own part of a house or have it on long lease, and then both the object of the right and the right itself was called *superficies,* and the holder was entitled to an interdict (D. XLIII. 18). On this right see Schmid, *Hdbuch.* § 25 sqq.; on the *insulae,* Becker's *Gallus* ed. Göll, II. p. 219 sqq.

insulam posse ita legari] The Greeks, as Mommsen notes, appear to have read *insulae usumfructum.* At any rate they so understood the passage. Steph. has *οἶκου δίνασθαι οὐσουφρούκτον οὕτω ληγατεύεσθαι, ἵνα δουλεία τις*

ὥσπερ ἀγρῷ ἐπιτέθη. So also Bas. and the commentator Cyrillus. The passage has difficulties (see Hasse, *Rh. Mus.* I. p. 87; Elvers, *Servituten*, p. 704). (1) How can a *seruitus* be said to be imposed when it is created only for the duration of a usufruct, and on property which belongs to the owner of the dominant tenement also, for *nulli res sua seruit* (D. VIII. 2. l 26)? (2) The second mode given by Pomponius does not constitute an urban servitude at all, but merely establishes a usufruct to last so long as the house is not built higher. (3) What is the good of such a servitude, when the fructuary even without it cannot build higher without the consent of the owner: above, l 13. § 7? Hasse takes *usumfructum* as meaning ownership, which is quite impossible. Elvers takes *imponere seruitutem* as not used in the strict sense, but only as practical arrangements for such a purpose, and suggests that such a stipulation would have given the heir a ready means by a penal clause of enforcing the servitude in favour of his own house, and one which would apply even if he sold the reversion of the servient house. It seems to me that we shall best understand Pomponius' point of view by taking this passage in connexion with the extract (from the 8th book of the same work of Pomponius) which is D. VIII. 4. l 8. *Si cum duas haberem insulas, duobus eodem momento traditis, uidendum est an seruitus alterutris imposita ualeat, quia alienis quidem aedibus nec imponi nec adquiri seruitus potest. Sed ante traditionem peractam suis magis adquirit uel imponit is qui tradit, ideoque ualebit seruitus.* In both passages the question is how to establish a servitude on one lodging-house in favour of another: and the answer in the passage just quoted is that you must not deliver them at the same time, but on the delivery of the first must reserve a servitude for the one still retained, or impose it on that in favour of the one delivered. So only can you avoid the double difficulty of a servitude being imposed on one of your own houses in favour of another of your own houses; and of your having no right of imposing a servitude on what has actually become another's house (D. VIII. 4. l 3; l 6. pr.). The question occurs, how does this stand as regards legacies by vindication whereby the legatees are at once owners of the estates directly the inheritance is entered on (Gai. II. 195)? The answer to this would I suppose be that the legacies must be taken as the testator directed, and the one legatee takes therefore his estate together with a right of road, &c., over the other, and the other legatee takes his estate subject to allowing such right of road in favour of the first-named. Then comes the case of our text: how if one estate be left to the heir, and the other be granted in usufruct to the legatee? Can a servitude be imposed on this latter estate, the propriety of which remains to the heir, in favour of an estate also left to the heir? And the answer is (so far I agree with Elvers in reference to the two difficulties first named): strictly speaking it cannot, but the testator may practically accomplish it by making a contract to allow the usufruct a condition precedent to the usufruct, or the disallowance of it a condition revoking the usufruct. When the usufruct is over, the

heir can arrange for himself. For the third difficulty Elvers partly supplies a solution. So long as the obligation not to build rests merely on the general law of usufruct, it is not a servitude in favour of a particular house. But if it rest on a stipulation with, as is usual, a penal clause (see note on l 3. pr. *pactionibus*, p. 38), it is available for the heir after selling the reversion of the servient house and for a purchaser or other successor of the dominant house (D. VIII. 3. l 36). Moreover *ne aedificia tollantur* is here only an instance of servitudes in general: and the third difficulty would not apply to some other servitudes. There is nothing to prevent a fructuary allowing *precario* the occupant of a neighbouring estate to walk or drive across the estate in usufruct, or to allow a neighbour to project a balcony over the house or area in usufruct. But if the testator desire to impose such servitudes on the fructuary's estate or house in favour of another house belonging to him, our passage is applicable.

The Greeks (Stephanus and Cyrillus) understood the engagement in the first form (*per se non fore*, &c.) to be that the fructuary would not object to the heir building higher; that however would require *quominus* instead of *quo*. And it would require further alteration before we could understand the passage of the fructuary's house being under a servitude to allow of the heir's house being raised. *Ea aedificia* would then be different buildings from *eorum aedificiorum*, and the second form would relate to a different servitude to what the first did.

ille] This pronoun is frequently used, especially in the lawyers, for a hypothetical person, where we should say 'so and so', or 'one', e. g. D. X. 4. l 19 *Nam illa ratione etiam studiosum alicuius doctrinae posse dicere, sua interesse illos aut illos libros sibi exhiberi;* XXXIX. 5. l 32 *L. Titius epistulam talem misit: Ille illi salutem. Hospitio illo, quamdiu uolueris, utaris;* XLVIII. 2. l 3. pr., where the form of notice of accusation of adultery is given as follows: *Consul et dies. Apud illum praetorem uel proconsulem L. Titius professus est se Maeuiam lege Iulia de adulteriis ream deferre, quod dicat eam cum C. Seio in ciuitate illa, domo illius, mense illo, consulibus illis adulterium commisisse;* Gai. IV. 46. So Hygin. *de condit. agror.* (p. 114. ed. Lachm.) *ex colliculo qui appellatur ille, ad flumen illud, et super flumen illud ad riuum illum, aut uiam illam, et per uiam illam ad infima montis illius*, &c.; Cic. *Rosc. Am.* 21. § 59 *Credo cum uidisset, qui homines in hisce subselliis sederent, quaesisse num ille aut ille defensurus esset.*

per se non fore quo, &c.] 'that it shall not be his fault, if the buildings are carried up higher'. Such phrases are very common with *quo minus*, especially in stipulations of this kind, e. g. *Per te non fieri neque per heredem tuum, quo minus mihi ire agere liceat*, D. XLV. 1. l 2. § 5; l 38. pr., &c. So *lex Iul. Municip.* 15 (Bruns, p. 98. ed. 4) *Quo minus earum rerum causa eisque diebus plostra interdiu in urbe ducantur agantur, eius hac lege nihil rogatur;* ib. § 7; § 12; § 18, &c. So *quo magis* D. XXXIV. 4. l 14. pr., Gai. II. 235; and after *nihil prohibet*, &c. in the same sense as *quo minus*,

Cod. III. 1. l 3; v. 34. l 1. See note on l 36. § 2 *per heredem staret quo minus*, and for classical usage, see *Lat. Gr.* § 1644.

Such a promise imported not merely that the promiser would refrain from contrary action, but that he would take care that the thing is (or is not) done (D. XLV. 1. l 50; l 83 pr.).

do lego] (*a*) 'give and bequeath', i. e. give and declare ('bequeath' being from the same Anglo-Saxon word as 'quoth'). *Lego* is from *lex*, 'the declaration' of the object and purpose of the transfer (*dare*). The word is as old as the XII Tables at least (*uti legassit suae rei ita ius esto* Gai. II. 224; see above, p. 49). On *lex* in this sense, see note above, p. 37. In the usual form of will (*per aes et libram* Gai. II. 103) the whole property of the testator was conveyed by mancipation with a declaration, originally made orally (cf. XII Tables ap. Fest. p. 173 *Cum nexum faciet mancipiumque, uti lingua nuncupassit, ita ius esto*), at a later period entered in tablets, and confirmed, as so written, by an oral declaration. This declaration made to the witnesses (hence *testari, testator, testamentum*) was in fact the will of the testator as to the disposition of his property. The formal words called *nuncupatio* as given by Gaius (ib. 104) were *Haec ita ut in his tabulis cerisque scripta sunt, ita do ita lego ita testor itaque uos, Quirites, testimonium mihi perhibetote.* The *do lego* would originally have reference to the heir who was the person to whom the conveyance and declaration was made. At a later period when (probably on account of the difficulty in securing the presence of the heir, e.g. *si testator subita morte urguebatur*, ib. 102), the mancipation was made to some one else, the *do lego* would be more general in its application, and would apply both to the heir and to any one who as legatee was to have the ownership directly conveyed to him by the will itself, and not by the agency of the heir in conformity to the will. (See note on l 3 pr. *et sine testamento*, p. 35.)

(*b*) The other principal use of *legare* is in commissions to ambassadors and lieutenant-governors, as seen especially in the substantive *legatus*. 'Appoint' in English applies in the same way to persons as well as to specific disposals of property, and would fairly correspond to *legare*.

(*c*) By the lawyers '*do lego*' was sometimes used without any syntactical construction as a kind of adverbial or adjectival phrase to denote a legacy *per uindicationem*, of which Gaius says *Per uindicationem hoc modo legamus 'Titio' uerbi gratia 'hominem Stichum do lego'* adding that *do* by itself, or *lego*, or even according to the better opinion *sumito*, or *sibi habeto*, or *capito* would have the same effect. *Ideo autem per uindicationem legatum appellatur quia post aditam hereditatem statim ex iure Quiritium res legatari fit* (II. 193, 194). Hence in the Vat. Fr. we have *per do lego legatum et per in iure cessionem et deduci et dari* (*ususfructus*) *potest* (§ 47 Paul.); *ususfructus do lego seruo legatus* (§ 57 Paul.); *in do lego legato* (§ 75. 1 Ulp.); *si duobus do lego ususfructus legetur* (§ 83 Ulp.); *in do lego legato non esse ius adcrescendi* (§ 87 Ulp.): and Paul. *Sent.* III. 6. § 26 *Coniunctim duobus ususfructus do lego legatus, altero mortuo, ad alterum in solidum pertinebit.*

quoad] 'so long as'. Cf. II. 14. l 52. § 3 *De inofficioso patris testamento acturis, ut eis certa quantitas, quoad uiueret heres, praestaretur, pactus est;* X. 2. l 39. § 2; XLII. 4. l 5. § 1; but its original meaning of 'until' is in D. XXV. 4. l 1. § 10 (several times); XLV. 1. l 9; XLVIII. 5. l 4 pr. Both meanings are found in classical Latin (*Lat. Gr.* §§ 1667, 1669). The reverse change is found in *quamdiu* which originally meaning 'as long as' came to mean 'until' infr. l 70. § 1.

§ 1. **arbores uento deiectas**] Trees blown down by the wind belong to the proprietor, except that the fructuary is entitled to take them, so far as may be required for the repairs of the homestead (l 12 pr.). Consequently the fructuary is not bound to replace them (l 59 pr.).

per quod] 'by which fact' = 'so that thereby'.

incommodior sit] The Flor. MS has *is* before *sit;* but it appears to be only a copyist's mistake.

uel iter] Probably a road to which the estate, of which he was usufructuary, was entitled. *Dominus* naturally means the proprietor of the same estate, but it may include also the owner of the estate over which the right of road lay.

suis actionibus] The plural does not imply that there was a number of different kinds of actions to which the usufructuary might resort, but that there might be several occasions. The regular action for the fructuary was the *uindicatio ususfructus* (commonly called the *confessoria* D. VIII. 5. l 2. § 1), and this he could use against the proprietor of the estate in usufruct or against any possessor whatever who disturbed him in his usufruct, e.g. against the possessor of a neighbouring estate who disturbed his road, *Si fundo fructuario seruitus debeatur, fructuarius non seruitutem* (sc. *itineris*), *sed usum fructum uindicare debet aduersus uicini fundi dominum* (D. VII. 6. l 5. § 1; cf. VIII. 5. l 4. § 5). Hindrance to his road was to be treated in the case of a fructuary as hindrance to his usufruct. So most lawyers (ib. l 1 pr.; VIII. 5. l 2. § 2): Julian had allowed him to claim the right of road itself (D. XLIII. 25. l 1. § 4). If the non-removal of the trees amounted to a prohibition of the road, the fructuary could proceed by the *interdictum de itinere actuque priuato* (D. XLIII. 19. l 5). If the road so obstructed was a public highway, he had the interdict *ne quid in loco publico uel itinere fiat* (ib. 8. l 2. esp. § 12; § 40). But this last would not come under the term *suis actionibus.*

usufr. cum eo experiundum] 'the usufructuary must try the matter with him (i.e. sue him), by his proper actions'. The use of *cum* is noticeable in such matters. The idea seems to be that a conflict is a co-operation of two hostile parties to obtain a decision. Similarly *bellum gerere cum aliquo, fidem cum hoste seruare, pacem cum Romanis facere.* So the consuls and higher magistrates when proposing a law to the people were said *cum populo agere* (Cic. *Lael.* 25); cf. Gell. XIII. 16. § 2; § 3 *Aliud est cum populo agere, aliud contionem habere. Nam 'cum populo agere' est rogare quid populum, quod suffragiis suis aut iubeat aut uelit, 'contionem' autem*

'habere' est uerba facere ad populum sine ulla rogatione (cf. Mommsen, *Staatsrecht* I². p. 187). In private life *quod tecum egi* (Ter. *Haut.* 595) 'what I discussed with you', or 'proposed to you'; *tecum orauī* 'spoke with you' i.e. asked you; *quod agas mecum ex iure ciuili ac praetorio non habes* (Cic. *Caecin.* 12. § 34); 'you have nothing to do with me (i.e. 'no ground for an action') either from the civil or praetorian law'. So frequently *cum quo agitur* for the 'defendant', opposed to *qui agit* for the 'plaintiff'. Our present phrase is found in Gai. IV. 163; D. III. 5. l 32 (33), &c.; *aduersus aliquem* esp. D. II. 4. l 10. § 4. *Experiri* in this sense of 'sue' is convertible with *agere*.

l 20. **fructus annuos**] The same decision, referred back to Labeo, is given by Javolenus D. XXXIII. 2. l 41. The 'annual' produce is taken to be equivalent to leaving a person the *fructus*, and the *fructus* was held to be equivalent to the *ususfructus* (D. VII. 8. l 14. § 1; Paul. *Sent.* III. 6. l 24 *Fructu legato si usus non adscribatur, magis placuit usumfructum uideri adscriptum: fructus enim sine usu esse non possunt*). Hence the legatee would have the use of the estate as well, and would have the *actio confessoria* and interdicts to protect him. On the other hand he would be entitled to the fruits only on gathering them, and the right would cease on his suffering *capitis deminutio* and on his death. A similar but somewhat more beneficial legacy was a grant of the produce year by year (*in singulos annos* l 25. § 2). Such a legacy, whether of the produce of a particular estate or of a sum of money (an annuity), or anything else, *in singulos annos*, 'for each year', was regarded as a series of legacies, each of which became due at the commencement of the year, the first vesting like any other legacy on the death of the testator and not being deferred till the heir's entry on the inheritance (D. XXXVI. 2. l 12. § 3; cf. VII. 3). In case of death of the legatee, this legacy, like that of a usufruct, came to an end, but the legatee's heir was entitled to the payment of the annuity for that year, if it had not been already received by the legatee (D. XXXIII. 1. l 4; l 8; XXXVI. 2. l 12). A usufruct *in singulos annos* was destroyed also by *capitis deminutio*, but only so far as that single year was concerned: with the next year commenced a new legacy unaffected by the *capitis deminutio* (D. VII. 4. l 1; l 2. § 1; l 3. pr.; IV. 5. l 10). Of course if the *capitis deminutio* was *maxima*, i.e. involved the loss of freedom, the legatee would, unless restored to his former position, be incapable of holding it again; if *media*, i.e. involved the loss not of freedom but of citizenship, the answer would be the same: for the usufruct would be regarded as a newly coming legacy and a non-citizen was incapable of taking such (Gai. I. 24, 25; Paul. *Sent.* III. 4 a § 9; XLVIII. 13. l 3; 22. l 15; l 6). How the matter would stand, if the testament were made by a provincial in favour of provincials, is another question.

Stephanus assumes that a resemblance only is here spoken of. His words are *βλέπε πῶς ἔχει τὸ ῥητόν· ὅμοιον εἶναι δοκεῖ ὥσπερ ἂν εἰ ὁ οὐσούφρουκτος ἐληγατεύθη. οὐκ εἶπεν ὅτι οὐσούφρουκτός ἐστιν ὁ ληγατευθείς, ἀλλ'*

ἔοικεν οὐσουφρούκτῳ. And he finds the point of resemblance in the limitation of this legacy to the life of the legatee. The text of Bas. identifies the legacy with that of a usufruct (χρῆσιν καρπῶν δοκῶ ληγατεύειν), and that appears to me to be right.

perinde...ac si] 'this language should be interpreted just as if'. *Perinde...ac si* is common in the Digest, e.g. III. 5. l 34 (35) pr.; VIII. 4. l 8 bis; XXXIV. 8. l 2; XXXVIII. 4. l 1 pr. &c., Ulp. I. 12; *Lex Malac.* 55. *Proinde ac* or *ac si* is also commonly so used by the lay writers (who however also use *perinde*), and by Gaius, e.g. I. 128; 134; 137; 148; 165, &c.; Ulp. XIX. 14. It is also (as Voigt *Ius Nat.* II. p. 729 shows) in grants to veterans *Corp. I. L.* III. p. 853 (A.D. 76); 891 (A.D. 216); 895 (A.D. 243); but seems to be rarely found in this sense in the Digest. It is so however D. XLVIII. 10. l 29; L. 17. l 205. Justinian has altered *proinde* in Gai. I. 128; 165; II. 87; 254 (Gneist's text is not to be trusted) into *perinde* in the corresponding passages of his Institutes, but has left *proinde* in those corresponding to Gai. III. 91; 176. In one place only of Gaius (III. 42) is *perinde* written in the MS in full. In three others the contraction for *per* is found—possibly by mistake. See Studemund's *Index Notarum* appended to his *Apographum* p. 286. Huschke notes (*Praef. ad* Justin. *Inst.* p. IX.) that in the first two books of the Institutes (which books he conjectures to have been drafted by Dorotheus) *perinde ac si* is several times put wrongly where *perinde ac* should be. It is noticeable that the alterations of *proinde* to *perinde* are only in the first two books.

Proinde in the Digest generally means 'accordingly', 'wherefore'. See note above on l 13. § 5 (p. 108).

l 21. **quidquid is,** &c.] See note on l 12. § 3 *stipulatus* (p. 86), and the passage of Gaius there quoted. The expression in our passage is more exact; *ex opera sua adquirit uel ex re fructuarii siue stipuletur siue ei possessio fuerit tradita.* Two bases of acquisition are named, viz. the slave's own services and the fructuary's goods: and two modes in which by the use of these an acquisition may be made, viz. stipulation by which an obligation would be acquired, and delivery by which property is conveyed, and a real action acquired. Stipulation covers the cases of contracts, whether the contract was for the sale or letting or pledging of the slave's services or of the fructuary's goods: it was usually secured by a stipulation; and delivery covers the acquisition of the property in the price paid for such sale or hire, or in the money taken up by the slave on mortgage, or in the articles sold or lent. Slaves were so frequently used for the management of business of various kinds, that the fructuary would lose the chief benefit of the usufruct of a slave, if he could not have used him as his own voice and hands with the full recognition by the law of the validity of the acts as those of the fructuary. But this is strictly limited in the case of the fructuary to acquisition on the two bases named, the slave's services or the fructuary's goods, and even with these the acquisition is divested in favour of the proprietor, if the slave expressly state in the

transaction that it is on behalf of the proprietor, or if he be acting by the order of the proprietor (l 25. § 3). The modes of acquisition named in the last part of the present law and in the next are all referable to the head of '*ex re fructuarii*'. See the notes.

ex opera] See note on l 12. § 3, *cuius operae* (p. 88). The plural is more common in this matter. But cf. Gai. III. 149 (speaking of partnership) *saepe opera alicuius pro pecunia ualet;* XLI. 2. l 1. § 20; XLIV. 7. l 5. § 6 *Si modo ipsius (exercitoris) nullum est maleficium, sed alicuius eorum, quorum opera nauem aut cauponam aut stabulam exerceret.* In one point of view the *opera* or *operae* of a slave are themselves part of the property of the person entitled, whether owner or fructuary: *Nam et operae quodammodo ex re eius cui seruit habentur, quia iure operas ei exhibere debet* (D. XLI. 1. l 23 pr.).

ad eum pertinet] 'belongs to him', i.e. the fructuary. So also in l 7 pr.; l 27 pr., &c., and cf. l 27. § 3 *haec onera ad fructuarium pertinent.*

siue stipuletur] The Vatican Fragments § 71 b, though the MS is much mutilated, seem to show that originally '*siue mancipio accipiat*' preceded '*siue stipuletur*'. Cf. Gai. II. 87; Ulp. XIX. 18; and note on l 12. § 3 *per trad. accipiat* (p. 87).

siue ei possessio fuerit tradita] Delivery of a thing, the property of which is to be transferred, is putting a person into exclusive possession of it; and hence delivery of the thing is the same as delivery of possession of the thing. Hence *tradere possessionem* is often used in the same meaning as *tradere rem*, but especially where there is some collateral distinction, e.g. between the delivery of the mere possession and the transfer of the ownership by the delivery, e.g. D. XLI. 2. l 38. § 1 *Existimandum est possessiones sub condicione tradi posse, sicut res sub condicione traduntur* (cf. Savigny, *Besitz.* § 19. p. 245. ed. 7); or where the person actually delivering is merely in possession and not the owner (D. II. 14. l 36). It is even used of a transfer of the legal, but not the actual, possession (D. VI. 1. l 77). For instances in general, see D. XVIII. 1. l 74 *Clauibus traditis ita mercium in horreis conditarum possessio tradita uidetur, si claues apud horrea traditae sunt: quo facto confestim emptor dominium et possessionem adipiscitur, etsi non aperuerit horrea;* ib. l 78. § 1; XIX. 1. l 3 pr. &c.; XLI. 2. l 21; l 33; l 48. So frequently with *uacua* (to secure *exclusive* possession); XIX. 1. l 2. § 1; l 3. § 1 sqq.

That (legal) possession could be acquired through a slave by the slave's owner was beyond doubt (Gai. II. 89; D. XLI. 2. l 1. § 5). Possession could also be acquired by the apparent owner of a slave, though the slave was really some one's else, or even not a slave, but a freeman, provided only the apparent owner was acting *bona fide.* And possession so acquired in due time ripened into ownership (Gai. II. 94; D. ib. § 6). But whether in the same way possession could be acquired by a fructuary through a slave, of which he had the usufruct, was in Gaius' time doubtful. *De illo quaeritur, an per eum seruum in quo usumfructum*

habemus, possidere aliquam rem et usucapere possimus, quia ipsum non possidemus (Gai. ib. 94). Ulpian however had no doubt: *Per eum in quo usumfructum habemus possidere possumus, sicut ex operis suis adquirere nobis solet; nec ad rem pertinet, quod ipsum non possidemus: nam nec filium* (D. ib. § 8). The doubt expressed by Gaius was omitted by Justinian when transferring this part of Gaius to his Digest (XLI. 1. l 10). But this doubt was not solitary. That a man could acquire possession through a child *in potestate* was clear: but the family included also persons *in manu* (a wife) and *in mancipio*. In Gaius' time there was a doubt about these (Gai. II. 90). The relations having become obsolete, Justinian had no need to solve this question.

The question was specially important before Justinian, because legal possession was the condition of usucapion; and usucapion was much relied on to heal defects in conveyance, such as transfer by mere delivery of what ought to be transferred by mancipation. On mancipation being abolished the defect of title in the transferor was the chief thing which might interfere with an ordinary transfer of property. But the full length of possession required for the interdicts contributed to the importance of the question of possession.

si uero heres institutus sit uel legatum acceperit] A slave could acquire nothing as his own in the eye of the law. He could not hold as owner. If a slave was made heir by his owner's will, the institution was null, unless he was made free also. Otherwise both slave and inheritance would be without an owner. If another person's slave was made heir, the master could direct him to enter, and on the slave's entering became himself at once heir through the instrumentality of the slave (D. XXIX. 2. l 79). Similarly a legacy to another man's slave was in effect a legacy to the slave's master. But if the slave was in usufruct, is the usufructuary or the bare owner to benefit? Most lawyers answered broadly, that entrance on an inheritance or acceptance of a legacy was not within either of the categories which entitled the usufructuary to acquire through the slave, and that consequently the owner, not the fructuary, took the inheritance or legacy. So Gaius II. 91 (=D. XLI. 1. l 10. § 3; Just. II. 9. § 4); Ulpian D. XXIX. 2. l 25 pr.; cf. *Reg.* XIX. 20; Julian (D. XXIX. 2. l 45. § 3) and Paulus (D. XLI. 1. l 47). Both these last give the reason that *aditio hereditatis non est in opera seruili* (D. XXIX. 2. l 45 pr.). A formal legal act of entry on an inheritance cannot be regarded as a slave's service. But Julian in the same passage (§ 4) throws out the suggestion that, if, as some asserted, and he admits to be possible, a *bona fide* possessor of a freeman in the guise of a slave can direct him to enter on an inheritance to which he has been instituted on the supposed master's account, the reason is that such an acquisition must be deemed to be *ex re domini*. How it can be so is not clear. It is not because the intention of the testator is conceived as already giving the master an equitable title: for that would imply an acquisition of what is already (equitably) my

own. I suppose Julian meant that some expenditure on the part of the master must be presumed to have in some way been necessary for the entry of the slave on the inheritance. This is possibly the ground on which Labeo proceeded in our passage. But it is more likely that Labeo followed what was reasonable, without caring whether the act could be brought under the old limitation *ex operis suis uel ex re domini.* Labeo's opinion was evidently adopted by Justinian (see l 22). It is confirmed by Bas. But there certainly is a contradiction in words between l 21, l 22 of our title and the passages of Julian (D. XXIX. l. c.) and Paulus (D. XLI. l. c.). Schrader (ad *Inst.* II. 9. § 4) reconciles them by regarding these last as the general rule and our passage as giving the exceptions. Pomponius (in D. XLI. 1. l 19) in discussing acquisition through a freeman, *qui bona fide mihi seruit*, says that he does not acquire an inheritance for me, but that if the intention of the testator is clear, the inheritance should be restored to me. See also note on l 25. § 3 *ipsi adquirere* (p. 169) for a like view taken by Pomponius in a case of stipulation. Such a solution, viz. acquisition by the owner with an obligation to restore to the fructuary would meet the difficulty in our passage, were it not for the positive words of l 22, *ipsi adquiret.*

cuius gratia] 'for whose sake'. Unless the slave were intended also to benefit in some way by the inheritance or legacy, one does not see why the inheritance should not have been directly given to the fructuary or bare proprietor. Pernice (*Labeo* I. p. 140) suggests that it may have been done to institute another's posthumous child as heir; cf. D. XXVIII. 5. l 65 (64). Possibly the convenience of a master (or fructuary) absent in the provinces may have been consulted by appointing a slave who was actually present, or could without difficulty be sent there, to enter on the inheritance. This however would not apply to the case of legacies.

l **22. in omnibus istis**] 'in all these cases of acquisition', e. g. inheritance, legacy, gift.

quid fieri oporteat] 'what should be done', i. e. who is to be held entitled.

ipsi adquiret] i. e. *fructuario.* So also below *dicendum est ipsi adquiri.* It is best translated by an emphatic 'for *him*', i. e. the man just named. So in l 25. § 3 *Scribit eum qui ex re fructuarii stipuletur nominatim proprietario uel iussu eius, ipsi adquirere, ipsi* is the proprietary and relates to *eius;* ib. § 4; XXIII. 3. l 10. § 6; XXIV. 3. l 64. § 4.

unde cognitum, &c.] 'how', or 'through whose merit, the donor or testator (has known, i. e.) came to know the slave'.

adquiretur domino] The *dominus* is the same as the *proprietarius*, but the term *dominus* is used because the general rule, that a slave's gains are the gains of his master, is now applicable without qualification.

condicionis implendae causa] e. g. if some one received a benefit under a will on condition, that he gave £100 to a slave whose services

I have as usufructuary. If it be shewn that I was intended to be benefited, the £100 when paid to the slave would come to me, not to the slave's owner.

A gift of some kind as a condition of benefit under a will is often mentioned, as imposed upon the heir, or a legatee, or a slave to whom liberty was granted (e.g. D. XXXV. 1. l 44; 2. l 76 pr.; XXXIX. 6. l 36; l 38). Such a gift received came under the category of *mortis causa capio*, which was not identical with, but inclusive of, *mortis causa donatio* (D. XXXIX. 6. l 31).

nam et in m. c. donat.] The line of argument implied in *nam* is something of this kind. 'This is true of a thing given *inter uiuos*, and it is true also of a gift in view of death (*donatio mortis causa*); therefore we may infer it to be true also of those cases of gift which have analogies to both'. See also preceding note.

A **mortis causa donatio** was a gift made usually, but not necessarily, in apprehension of some impending danger to life, e.g. by a man dangerously ill, or about to take a dangerous journey. The essential characteristic was that it should take effect only on the giver's death, and, if the person to whom it was given died first, should be null. Marcian defines it epigrammatically: *Mortis causa donatio est, cum quis (magis) habere se uult quam eum cui donat, magisque eum cui donat quam heredem suum* (D. XXXIX. 6. l 1). The gift could be made in any suitable form (mancipation, tradition, &c.) and the thing given might either remain with the donor, or be handed over to the donee, subject to be reclaimed by the donor, either if the donee died first, or (provided such was the understanding), if the donor changed his mind (ib. l 13; l 29, &c.). In some respects a *m. c. donatio* resembled a legacy, and hence restrictions imposed on the power of giving and receiving legacies were extended to gifts in view of death (cf. Gai. II. 225, 226; D. XXXIX. 6. l 42. § 1). In case of the donor's insolvency, or of a will being set aside in favour of parents or children, such gifts were invalidated (D. ib. l 17; XXXVII. 5. l 3 pr.). Ulpian's broad statement in D. XXXIX. 6. l 37 probably related only to the application of the *lex Papia Poppaea*, and was made general by Justinian (*Inst.* II. 7. § 1).

l 23. **stipulando**] After treating of the acquisition of things through a slave, Ulpian proceeds to the acquisition of obligations and the like. By a stipulation a slave acquires for a fructuary a valid obligation upon which he can sue; by a bargain or informal agreement he acquires, not a right to sue, but a plea capable of defeating another's suit; by obtaining a formal release (*acceptum rogando*), he acquires for a fructuary the extinction of a subsisting obligation.

paciscendo] 'by making a bargain'. A *pactum* was a verbal agreement not made in solemn form (*stipulatio*). If it was made in immediate connexion with a definite legal contract, e.g. a loan, deposit, pledge, sale, hiring, partnership, commission or the like, it was regarded as defining the

precise terms of the business (see note on l 3. pr. p. 37), and thus became a valid ground of the obligation. *Solemus dicere pacta conuenta inesse bonae fidei iudiciis: ea pacta insunt quae legem contractui dant* (D. II. 14. l 7. § 5). But if it was subsequent at some interval or stood by itself, independent of any other transaction, it was held not to create an obligation and consequently gave no right to sue on it; but, as an agreement made in good faith, the Praetor protected it, and so far enforced it as to allow it to be a valid plea (*exceptio*) against any one suing in spite of it (D. II. 14. l 7. § 7 sqq). The title *de pactis* in the Digest is placed in the part relating to procedure and hence is mainly occupied with agreements *not* to sue, and some introductory matter of a more general kind. Hence the doctrine is appropriate: *nuda pactio obligationem non parit, sed parit exceptionem* (ib.). Some pacts, however, especially *constitutum debiti* (D. XIII. 5; Cod. IV. 18) i.e. an arrangement for the payment by the debtor or other of an existing debt, were allowed to give a right of suing.

idemque] 'and Julian also writes'.

acceptum rogauerit] Corresponding to the *stipulatio*, i.e. the solemn verbal contract made by question and answer which created an obligation, was a solemn verbal form of release from the same, made also by question and answer, here as in other cases the question being put by the party to be benefited, the answer by the party consenting to accept the burden or waive the benefit. The debtor seeking a release *acceptum rogauit;* the creditor granting a release *acceptum fecit.* The debtor said *Quod ego tibi promisi habesne acceptum?* The creditor answered *Habeo* (Gai. III. 169) or the forms might be *Accepta facis decem? Facio* (D. XLVI. 4. l 7). This was called *acceptilatio*, a term clearly borrowed from bookkeeping, and in this connexion we find *acceptum (accepto) ferre* used in D. XXI. 2. l 4. § 1; XXXII. l 29. § 2; l 91. § 3; and in metaphorical use 'to credit with', in Val. Max. II. 7. Ext. 2; VIII. 2. § 3; Sen. *Ep.* 78. § 3. But *acceptum (accepto) facere* or *fieri*, in the sense of putting an end to an obligation, is found in Cic. *Verr.* III. 60. § 139; Plin. *Ep.* II. 4; VI. 34; and frequently in the law writers, e. g. Gai. III. 215; and indiscriminately with *acc. ferre* in Dig. XLVI. 4. The use of *accepto* (predicative dative?) is found only in the law writers.

An *acceptilatio* was of itself a complete release and required no payment or other satisfaction of the debt: *Uelut soluisse uidetur is qui acceptilatione solutus est* (D. ib. l 16). Any obligation, whether due now or not till some future time, may be extinguished by this form, by first being brought into a stipulation (ib. l 8. § 3; l 12). At one time it was doubted whether part of an obligation could be thus released (Gai. III. 172), but this doubt was removed afterwards. The obligation must however be of its own nature divisible: thus a release of part of a usufruct is valid in the sense that the usufruct of part of the estate is released, but a release of part of a right of road is not valid (D. ib. l 13. § 1). The release itself must be present and absolute, not future nor conditional (l 4; l 5).

With our present passage may be compared D. ib. l 11. *Species adquirendi est liberare dominum obligatione: et ideo fructuarius quoque seruus liberare, acceptum rogando, fructuarium potest, quia ex re eius uidetur ei adquirere: sed et si usum tantum habemus, idem fiet.*

liberationem] 'freedom from an obligation'. This is the regular use of the word in the Digest. So also *liberare*. Cf. D. L. 16. l 47 *Liberationis uerbum eandem uim habet quam solutionis;* IV. 2. l 9. § 4; XLVI. 3 passim.

ei părĕre] 'that the slave obtains for the fructuary (*ei*) freedom from the obligation'. So *parere actionem*, D. XX. 1. l 17; *obligationem*, XLV. 1. l 108; *exceptionem*, XLIV. 2. l 6; &c.

cogendum] 'that he may be compelled'=*cogi posse*. Very common. Both expressions occur in the same sense and application in D. XXXVI. 1. l 17 (16) pr. For this use of the gerundive, see *Lat. Gr.* § 1404 and Pref. p. lxxvii.

operari] 'to work'. Plin. XI. 21 *Quibus est earum* ('bees') *adulescentia, ad opera exeunt, seniores intus operantur;* D. XXVIII. 5. l 35. § 3; XL. 7. l 3. § 8 *Quod si prohibeatur operari, non fore liberum, quia operari domino debet* ('he owes his master work', and consequently cannot claim to be allowed to make wages by working for another); *sane si testator uel ex operis ut det iussit, prohibitum operari ad libertatem peruenturum non dubito.* The nature of the work demanded from a slave would of course depend on the qualifications and habits of the slave. See above l 15. § 1.

modicam castigationem] See above l 15. § 3; l 17. § 1. Cf. D. II. 1. l 12 *Magistratibus municipalibus supplicium a seruo sumere non licet, modica autem castigatio eis non est deneganda. Castigare* is a general word, cf. Cic. *T. D.* III. 27. § 64 *Pueros matres et magistri castigare etiam solent, nec uerbis solum, sed etiam uerberibus, si quid in domestico luctu hilarius ab iis factum est aut dictum, plorare cogunt.* But beating is the regular meaning, cf. D. XLVII. 10. l 15. § 30; &c.

torqueat, &c.] Cf. Paul. *Sent.* III. 6. § 23 *Seruos neque torquere neque flagellis caedere neque in eum casum facto suo perducere ususfructuarius potest, quo deteriores fiant.* See l 15. § 3; l 17. § 1; l 66. On putting slaves to torture in order to obtain evidence, see D. XLVIII. 18; Paul. *Sent.* V. 14—16.

l 24. In this and the beginning of the next law we have mention made of two modes by which a man can make a gift to another through the medium of a slave, of which the donee has the usufruct. In this law the slave stipulates, the donor promises; in the next the donor stipulates for himself or for the slave.

spoponderit] This was the technical word used by Romans in giving a solemn verbal promise. The stipulator said *dari spondes? (spondesne?)*; the promiser answered *spondeo*. But other words were used by Romans with the same import in dealings with either Romans or foreigners, e. g. *promittis? Promitto. Facies? facio*, &c. Cf. Gai. III. 92, 93 *Haec quidem uerborum obligatio 'dari spondes? spondeo' propria ciuium Romanorum est;*

cetera uero iuris gentium sunt; Cic. *Caecin.* 3. § 7 *Si quis, quod spopondit, qua in re uerbo se obligauit uno, si id non facit, maturo iudicio sine ulla religione iudicis condemnatur; Rosc. Am.* 5. § 13 *Stipulatus es—ubi, quo die, quo tempore, quo praesente? quis spopondisse me dicit?*

in quem usumfructum habet] sc. *ususfructuarius.* Gaius has *in quo usumfr. habemus,* &c. So II. 86; 91; 94; III. 165; Ulp. XIX. 21. On the other hand Gaius has the accusative of the *person* over whom power is exerciseable, e. g. I. 55 *Fere nulli alii sunt homines, qui talem in filios suos habent potestatem, qualem nos habemus.* Cf. D. I. 18. § 3.

ei] sc. *fructuario.*

talis] A slave of whom he has the usufruct. It must be shewn, that it was to benefit the usufructuary that the donor promised. See above, l 22 pr., and l 25 pr.

l 25 pr. **si quid stipuletur,** &c.] 'moreover if he stipulate for anything for himself or for Stichus, a slave in usufruct, with the view of making a gift, wishing thereby payment to the fructuary, we must say that if the debt is paid to the slave, the fructuary acquires it'.

The inferior MSS have *si quis* which is attractive. But there is no necessity for it. The subject of *stipuletur* may well be '*quis*' of l 24.

fructuario] adjective with *seruo,* as in l 22 *seruus fructuarius consequatur,* and elsewhere.

dum uult] See *Lat. Gr.* 1665. For *uult praestitum* 'wishes performance made', *Lat. Gr.* § 1400.

praestitum] *Praestare* is 'to take upon oneself', 'to be answerable for', 'to furnish' or 'supply', 'to warrant'. Its principal uses will be seen in the following passages. Gai. IV. 131 *Saepe ex una eademque obligatione aliquid iam praestari oportet, aliquid in futura praestatione est,* 'something has to be furnished at once, something not till a future time'; see below, l 50 *usumfructum praestare;* Gai. III. 137 *In his contractibus* (i. e. *ex consensu*) *alter alteri obligatur de eo, quod alterum alteri ex bono et aequo praestare oportet,* D. XXXVII. 9. l 1. § 19 *Curator constituendus est qui cibum, potum, uestitum, tectum mulieri praestet;* XXX. l 82. § 5 *Necesse habet alteri actiones suas, alteri litis aestimationem praestare,* i. e. to allow one to sue in his name, and to furnish the other with a sum of money equivalent to that which would be recovered in the action; XVIII. 1. l 66 pr. *In uendendo fundo quaedam etiam si non dicantur praestanda sunt, ueluti ne fundus euincatur* 'warranted against eviction' (cf. Cic. *Off.* III. 13. § 55); XIII. 6. l 5. § 2 *In contractibus interdum dolum solum, interdum et culpam praestamus;* § 3 *In commodato Q. Mucius existimat et culpam praestandam et diligentiam, et si forte res aestimata data sit, omne periculum praestandum ab eo qui aestimationem se praestaturum recepit,* where 'to be answerable for' is a translation suiting both 'fraud' and 'fault' (which should be avoided) and *diligentiam* (which should be shewn). In Gai. IV. 2 *Cum intendimus dare, facere, praestare, oportere* Savigny takes *dare* to relate to making over property or servitudes, *facere* to any other contractual per-

formance, *praestare* to duties resulting from torts (*System* v. p. 598 sqq.; *Obligat.* I. § 28, p. 300). Wächter, *Erörter.* II. p. 69, and Böcking, *Pand.* I. p. 289, refer *praestare* specially to obligations arising from consensual contracts. *Dare* and *facere* are regularly used in formulae: *praestare*, as Savigny remarks, is not found in the *intentio* of any of the formulae preserved to us.

si ei soluatur, fructuario adquiri] It was an essential principle of a stipulation that it was valid only, if you stipulated for something to be done or given to yourself (D. L. 17. l 73. § 4). The exceptions to this rule, more apparent than real, were these:

1. Persons under the same power could stipulate in favour of their master or of each other; and the master could stipulate in favour of them. In all cases the benefit came directly to the master. D. XLV. 1. l 38 *Alteri stipulari nemo potest praeterquam si seruus domino, filius patri stipuletur: inuentae sunt enim huiusmodi obligationes ad hoc, ut unusquisque sibi adquirat quod sua interest; ceterum ut alii detur nihil interest mea;* ib. § 6; l 39; l 40; l 45 pr. *Quodcunque stipulatur is, qui in alterius potestate est, pro eo habetur ac si ipse esset stipulatus;* l 130.

2. A person might stipulate for something in favour of another if it was for his own interest that that other should be so benefited, e. g. for payment to be made on his behalf to a creditor, or if a retiring guardian stipulates from his co-guardians for the proper administration of the ward's property; or if one under an obligation stipulates with a third person to perform the covenants for him; or if a man stipulates for the payment &c. to his own procurator (D. ib. l 38. §§ 20—23).

3. A man may stipulate in favour of himself and his heir, e. g. for a right of road. The heir can sue on the stipulation as well as himself. There is here a continuity of person. (D. ib. §§ 12—15 *Suae personae adiungere quis heredis personam potest.*)

4. A man may stipulate in favour of himself *and* an outsider. In this case all agreed that the outsider got nothing; but there was, as Gaius tells us (II. 103), a doubt whether the stipulator could sue for the whole or only for a half. The latter opinion prevailed (Pompon. D. XLV. 1. l 110 pr. *Si mihi et Titio, in cuius potestate non sim, stipuler decem, non tota decem sed sola quinque mihi debentur: pars enim aliena deducitur, ut quod extraneo inutiliter stipulatus sum, non augeat meam partem*).

5. A man may stipulate in favour of himself, *or* an outsider; The outsider acquired no rights, but payment to him was good payment and freed the promiser. In fact it was taken that the outsider was put into the stipulation for the greater convenience of payment, the real interest being that of the stipulator, who however thus authorised the outsider to give a receipt (D. XLVI. 3. l 10 *Quod stipulatus ita sum 'mihi aut Titio', Titius nec petere nec nouare nec acceptum facere potest, tantumque ei solui potest;* XLV. 1. l 56. § 2 (Julian) *Qui sibi aut filio suo dari stipulatur, manifeste personam filii in hoc complectitur ut ei recte soluatur: neque interest*

sibi aut extraneo cuilibet, an sibi aut filio suo quis stipuletur: quare uel manenti in potestate uel emancipato filio recte soluitur). See generally Gai. II. 103; D. XLV. 1. l 141; Just. III. 19. § 4. It was however possible to get over the rule by stipulating, not directly in favour of a third person, but for a penalty to be paid to yourself if the desired payment or performance in favour of the third person was not made (D. XLV. 1. l 38. § 17).

In the case mentioned in our passage the usual intention of stipulating for oneself *or* another is negatived by the words *donandi causa*. But the result is not altered. Whether the person eventually to be benefited by the matter stipulated for be the stipulator or the slave or the fructuary, the stipulator only can sue. Payment to either stipulator or slave is good; but payment to the fructuary is not good, cf. D. XLVI. 3. l 9 pr. Payment to the slave however is in effect payment to the fructuary.

§ 1. **in pendenti est**] See note on l 12. § 5 (p. 96). The same case is put and expression used in D. XLI. 1. l 43. § 2 (see next note but one).

fecit satis] See above on l 12. § 5 *satisfacto* (p. 96).

interim cuius sit] For the purpose of making a contract of purchase and sale, intention to transfer the property, and agreement on the thing and on the price, is sufficient. Each party has then a right of action on the purchase or sale (D. XVIII. 1. l 2. § 1; l 9, &c.). But this agreement has no effect on the ownership of the thing. In order that the property may pass, delivery must be made on the one side either actually or constructively (D. XLI. 1. l 9. §§ 3—8; Cod. II. 3. l 20), and on the other the price must be paid, or a pledge or security given, or credit allowed (D. XVIII. 1. l 19; l 53). But to whom has the property passed in this case? The slave can acquire, either for the fructuary or for the bare owner. For the fructuary in the case put, only if the money comes from him: for the owner, both if the money come from him, and, though it come from the fructuary or elsewhere, if the slave expressly name the owner in making his bargain, or make the bargain by his bidding (below § 3; D. XLV. 3. l 39). Meantime, till the money is paid, according to Julian the ownership of the thing delivered to the slave is in suspense; and consequently no one could bring an action, if it were lost or stolen or damaged (cf. l 12. § 5; D. XXI. 1. l 43. § 10).

It is not necessary that the slave should have taken for the payment the owner's or the fructuary's money in the non-legal sense of the term. The money may have come from the slave's *peculium*, i.e. from what was practically recognised as the slave's private property, procured probably by gradual savings. And a slave in usufruct might have two *peculia*, one derived ultimately from the bare owner, the other from the fructuary, and respectively belonging to each. This is supposed in D. XLI. 1. l 43. § 2 where Gaius after putting the case given in the text goes on, *Et cum ex peculio, quod ad fructuarium pertinet, soluerit, intelligitur fructuarii homo fuisse: cum uero ex eo peculio, quod proprietarium sequitur, soluerit, proprietarii ex post facto fuisse uidetur.* See also XV. 1. l 19.

dominium eius] 'the ownership of it', i. e. the thing bought and delivered.

retro fructuarii fuisse] If the payment came from the fructuary's goods, the thing (or the property in the thing) belonged to the fructuary from the first, i. e. from the time of the delivery. *Retro* 'dating backwards' is often used of an extension into the past of that which is ascertained only at the present. Cf. D. VIII. 4. l 18 *Cum postremus* (last of several owners) *cedat* (*seruitutem*), *non retro adquiri seruitus uidetur, sed perinde habetur, atque si cum postremus cedat omnes cessissent;* IX. 2. l 35; XXX. l 44 pr.; § 1; &c.; XXXIV. 5. l 15 (16) *Quaedam sunt, in quibus res dubia est, sed ex post facto retro ducitur et apparet quid actum est.*

idemque est si, &c.] 'and the same is the result, if' &c. This case of a loan of money, with a stipulation for repayment, is also put in D. XLV. 3. l 18 fin. For *idem est*, &c., cf. D. XII. 1. l 18. § 1; &c.

ergo ostendimus, &c.] 'we have shewn then that the ownership is in suspense, till the price is counted out: but what are we to say, if', &c. *Ergo ostendimus* is merely to form a base for putting the difficulty arising from the loss of the usufruct. For *ostendimus* cf. D. XXVII. 7. l 4 pr.

si amisso usufr.] 'if before the price be counted out, the usufruct be lost' e. g. by death or *capitis deminutio*.

adhuc interesse unde, &c.] 'that it still turns on the point whence came the price that was counted out'. For *adhuc* in this sense of continued affirmation, almost 'notwithstanding that', cf. Gai. II. 84 *Sed tamen si ex ea pecunia locupletior factus sit et adhuc petat;* D. XXXVI. 4. l 1 pr.; XXXVII. 4. l 8. § 5. In Gai. III. 85; 176 it denotes actual continuance of the state spoken of: in III. 102; 152; 180 it introduces an additional case of invalidity, dissolution, &c.: all nearly allied uses. For *interesse*, cf. *intererit cuius priores nummos soluat* (in this section); D. XLI. 2. l 39 *interesse puto, qua mente apud sequestrum deponitur res.*

humanior est] 'is kinder', i. e. to the usufructuary, whose money has been spent. If the opinion of Marcellus had prevailed, still the fructuary would have had a claim (*condictio indebiti*) against the proprietor (D. XIX. 1. l 24; cf. XLV. 3. l 39; XV. 1. l 19. § 2). But if the money had been taken, not from the fructuary's own moneys, but, from that part of the slave's *peculium* which technically belonged to the fructuary, the thing purchased would be in the slave's *peculium*, and, I suppose, would in practice continue, notwithstanding the cessation of the usufruct, to be with the slave though merged with his other *peculium*. In that case the fructuary would not in practice be entitled to recover. For *humanior* cf. D. XIII. 5. l 24; XXVIII. 5. l 85 (84); XXXIV. 5. l 10 (11) § 1 *in ambiguis rebus humaniorem sententiam sequi oportet.*

pro rata pretii soluti] 'according to the proportion in which each estate contributed to the price paid', e. g. if 15,000 sesterces from the fructuary and 5000 sesterces from the proprietary, the fructuary will be owner of three fourths of the thing acquired, the proprietary of the remaining fourth. *Pro rata* occurs in Liv. XLV. 40. § 5; the full phrase *pro rata*

parte in Cic. *Tusc. D.* I. 39. § 94; *pro rata portione* in Plin. *H. N.* XI. § 40; D. XXXV. 2. l 73. § 5; XXXVI. 1. l 77 (75) pr. The inferior MSS add *portione* in our passage. *Pro rata* is frequent in the Digest, e.g. XIV. 4. l 5. § 19; XI. 7. l 27 pr. (its synonym *pro portione* is in l 22). *Ratus* in such expressions means 'counted', 'reckoned'; hence *ratam rem habere* 'to count' or 'allow (=ratify) a matter'; *irritum testamentum* 'a will not reckoned' or 'allowed'.

si forte simul soluerit ex re utr.] 'if he made a payment in full at the same time from the estate of each', i.e. pays a debt of 10,000 sesterces with 10,000 sesterces from one and another 10,000 sesterces from the other.

pretii nomine] i.e. 'professedly as the price of the thing', and consequently with the intention of making over to the seller the property in the coin, and acquiring the property in the thing. Cf. Gai. III. 141.

cui magis] 'for which rather than the other'. One would have expected *utri...adquirat.*

intererit cuius priores, &c.] 'it will turn on the point whose moneys he pays first', i.e. whether the coins which he actually uses in payment are the fructuary's or the proprietary's. The payment is accomplished as soon as ten thousand sesterces are paid: if the sesterces were the fructuary's, the property in the thing will belong to him; if the proprietary's, then to him.

uindicabit] 'he will claim the coins as being still his property; if however they be confused with others, or spent, he will sue for the amount, not for the specific coins'.

ad condict. pertinent] 'they are matter for a condiction' (not for a vindication).

simul in sacculo soluit] i.e. if he puts the 20,000 sesterces into a bag and hands over the bag as the price, it is impossible to say which are paid first. As more than the correct amount is thus paid, the slave cannot be therein acting as the agent of the proprietary or fructuary, and therefore can have no authority to convey the property in the moneys. Had more than the proper amount been paid by the owner of the moneys, he would have had a right to recover the excess. If the payment was in such a form that the excess did not admit of ascertainment and separation, the whole could be recovered, e.g. if a man in payment of a debt of £100 conveyed an estate worth £200. But with money and other things which can be weighed and numbered, the excess can be fairly ascertained and separated (D. XII. 6. l 26. §§ 4—6; L. 17. l 84 *Cum amplius solutum est quam debebatur, cuius pars non inuenitur quae repeti possit, totum esse indebitum intellegitur, manente pristina obligatione*). *In sacculo dare* is contrasted with *numerare* in D. XL. 7. l 3. § 6.

nihil fecit accipientis] 'he conveyed the property in nothing to the receiver'; i.e. the property in all the money in the bag, notwithstanding the delivery, still remained where it was before: nothing passed to the

receiver. The expression is common, e.g. Gai. II. 81 *Si quando mulier mutuam pecuniam alicui sine tutoris auctoritate dederit, facit eam accipientis;* D. XLIV. 7. l 1. § 2; &c.

plus pretium] 'more than the price'. This use of *plus* instead of *plusquam* is common with numerals (*Lat. Gr.* 1273), but not with words like *pretium.* So that it is better perhaps to take *plus* here as an adjective and translate the phrase 'an excessive price'. For *pluris pretii* is occasionally found in this sense in classical writers, and in D. XII. 6. l 26 we have *maioris pretii res* in § 4 corresponding to *oleum pluris pretii* in § 5. Cf. *Lat. Gr.* § 1187 and Pref. to Vol. II. p. lix.

soluit seruus] The stress of the sentence is on *seruus.* See note above on *simul in sacculo.*

§ 2. **si operas suas...locauerit**] Cf. below l 26. Papinian puts the same case in D. XLV. 3. l 18. § 3.

in annos singulos certum aliquid] 'a fixed yearly sum'. As in the case of sales so in that of letting, the contracts so called were not concluded unless the price or hire was definitely agreed. But was it required that the agreement should actually fix the price or hire at the time, or fix the person who should fix it? Labeo and Cassius held the former to be required: others thought the latter sufficient. Justinian eventually decided for the latter (altering Gaius in D. XIX. 2. l 25 pr. accordingly) provided the person so agreed on did actually fix the price or hire: if he did not the agreement was null (Gai. III. 140—143; Just. III. 23. § 1; 24. § 1). With the language in the text compare Gai. III. 142 *Nisi merces certa statuta sit, non uidetur locatio et conductio contrahi;* D. XXIV. 1. l 52 *Locatio sine mercede certa contrahi non potest.* Both speak of *merces*, and *merces* like *pretium*, as is generally held, must be in money. This is supposed to follow from the following passages, D. XVI. 3. l 1. § 9; XVII. 1. l 1. § 4; XIX. 5. l 5. § 2; *Inst.* III. 24. § 2; Theophil. *Inst.* III. 24 pr. καὶ ὥσπερ εἰρήκαμεν ἐκεῖ, κέρτον (*certum*) καὶ ἐν ἀργυρίῳ ὀφείλειν εἶναι τὸ τίμημα, οὕτω καὶ τὸ μίσθωμα κέρτον καὶ ἐν ἀργυρίῳ εἶναι δεῖ; ib. § 2. Ordinary language however admitted certainly of the *merces* for a farm being in a quantity or proportion of the produce, e.g. Liv. XXVII. 3 *Capuae Flaccus bonis principum uendendis, agro qui publicatus erat locando (locauit autem omnem frumento) tempus terit;* Plin. *Ep.* IX. 37 *Medendi una ratio si (praedia) non nummo sed partibus locem.* And this was evidently recognised by the lawyers also D. XIX. 2. l 25. § 6; XLVII. 2. l 26. § 1; Cod. IV. 65. l 8 *Licet certis annuis quantitatibus fundum conduxeris,* &c.; l 21 *Si olei certa ponderatione fructus anni locasti.* An arrangement for taking part of the rent in kind is mentioned in D. XIX. 2. l 19. § 3. This exception from the general rule is generally admitted (see the discussion in Glück XVII. p. 327 sqq.), but in truth it is only Theophilus who definitely lays down the rule. In the other passages it may fairly be held that the question of measurable produce was not present to the writers. Compensation for the use of a thing, if agreed to be made in some other form than money or measurable produce

of the thing, was no doubt protected, not by the *actio locati conducti*, but by an *actio in factum* or a *condictio* (D. XIX. 4; 5).

Certum aliquid is a wide expression. Cf. D. XII. 1. l 6 (Paulus) *Certum est cuius species uel quantitas quae in obligatione uersatur aut nomine suo aut ea demonstratione, quae nominis uice fungitur, qualis quantaque sit ostenditur.* The *lex Silia* which introduced an improved procedure (*condictio*) for recovering *certam pecuniam* was followed by the *lex Calpurnia* which authorised the same procedure for *omnem certam rem* (Gai. IV. 19): and Gaius in D. XLV. 1. l 74 gives a wide definition: *Stipulationum quaedam certae sunt, quaedam incertae. Certum est quod ex ipsa pronuntiatione apparet, quid quale quantumque sit, ut ecce aurei decem, fundus Tusculanus, homo Stichus, tritici Africi optimi modii centum, uini Campani optimi amphorae centum.* Cf. ib. l 75.

In our text both general probabilities and the use of *locauerit* make it reasonable to suppose that the hire was in money. But the certainty is the important point, where the right to receive it shifts, and there is no privity between the parties successively entitled.

eorum annorum stipulatio] A short expression for 'the right to sue for the hire of those years'. The stipulation is treated as if divisible into a stipulation for each year, just as a legacy *in singulos annos* was regarded as a series of legacies, and a usufruct *in sing. annos* as a series of usufructs (D. XLV. 1. l 54; XXXIII. 1. l 11; VII. 4. l 2. § 1).

quibus us. fr. mansit] 'for which the usufruct lasted'. The ablative is used in post-Augustan writers frequently of the duration of time. The case assumes the usufruct to lapse during the continuance of the lease. See on l 26.

semel adquisita fructuario] 'having been once acquired by the fructuary' (*fructuario* is the dative; cf. *Lat. Gr.* § 1146). One could not stipulate for another (above, p. 157), therefore the stipulation could not have been made by the fructuary, nor by the fructuary's slave acting for the fructuary, in favour of the proprietary. But, once made, it in this case passed on with the complete exercise of ownership of the slave.

For *semel* 'once', as opposed to 'not yet' or 'not at all', compare *semel adquisita* in the next line; D. L. 17. l 139 *Omnes actiones quae morte aut tempore pereunt, semel inclusae iudicio, saluae permanent;* XXXVI. 1. l 65 (63). § 2; 2. l 2 fin.; Gai. II. 257; &c.

quamuis non soleat] Ulpian points out that this is an exception to the general rule, which was that a stipulation, like any other obligation, was a personal link between two definite persons, and could be transferred from one of those persons to another only in connexion with a transfer of the whole legal position of that person. As a separate claim a stipulation could not be transferred, but a new stipulation could be entered into between *B* and *C* which would take the place of that between *A* and *B* (Gai. III. 176; D. XLVI. 2. l 1 &c.). The difference is best illustrated by bills of exchange. The indorsing of a bill of exchange is a transfer of the

right to sue upon the bill from the drawer or other payee to the indorsee or to bearer and may be done without consulting the drawee. Such a transfer was not allowed in Roman law. But if instead of indorsing, the drawer got the drawee to accept another bill drawn by a third party, and this operated as an annulment of the first bill, we should have a procedure analogous to that of the Roman novation.

There were however some occasions or modes by which a third party stepped into the legal position of another, as a whole, including its rights and its obligations. The two usual and, in the later law, almost the only occasions were inheritance and adoption. (See Just. II. 9. § 6.) Gaius (II. 98) enumerates five such occasions *Si cui heredes facti sumus, siue cuius bonorum possessionem petierimus, siue cuius bona emerimus, siue quem adoptauerimus, siue quam in manum ut uxorem receperimus, eius res ad nos transeunt*, in which place *res* includes all rights and liabilities of the predecessor. Of these the *bonorum possessor* is in our text included under the word *heres* (D. XXXVII. 1. l 2; L. 16. l 170); the *emptio bonorum*, or purchase of the whole estate of an insolvent, became obsolete with the change of judicial procedure (*Inst.* III. 12 pr.), and the *conuentio in manum*, or subjection of a woman to the full power of her husband, as if he were her father, went out of use also. It was connected with three forms of marriage, *usus, confarreatio, coemptio* (Gai. I. 110). *Usus* was obsolete in Gaius' time (ib. 111). *Confarreatio* is spoken of by Tac. (*An.* IV. 16) as rarely occurring, and in Gaius' time was used only in connexion with certain priesthoods (ib. 112), and passed away at latest with the abolition of the old Roman priesthoods by Theodosius, A.D. 394. *Coemptio* existed in Gaius' time and was probably meant by Papinian (*Coll.* IV. 7) and Paulus (ib. IV. 2. § 2), in speaking of *in manum conuenire*. By Servius (ad *Georg.* I. 31) and Boethius (ad Cic. *Top.* 3) it is spoken of only as in use in former times. It had expired before Justinian. Cf. Rossbach's *Ehe* p. 57; Kuntze, *Cursus*[2], § 773; § 976.

A succession somewhat analogous to that of a *bonorum emptor* or *possessor* was created by a constitution of M. Antoninus in order to secure effect being given to manumission of slaves by will. If no one who had a right or claim by law to enter on the inheritance was willing to do so, the estate of the testator might be assigned to a slave or stranger who gave good security for the payment of the debts. He would have, if he desired it, the rights of patron to the emancipated slaves, and guardianships (D. XL. 5. l 2—l 4; Just. III. 11; Cod. VII. 2. l 6; l 15).

non soleat] 'does not frequently' or 'as a rule'; the case mentioned in the text being an exception. For *solere* cf. D. XXIV. 3. l 57 *ususfructus ad heredem non solet transire:* XXIII. 3. l 43 pr.

semel cui quaesita] 'after once being gained by any one'. *quaesita* seems to be synonymous with *adquisita;* so below § 3 *quod fructuario adquiri, non potest proprietario quaeri*, § 6 fin.

heredem] D. L. 16. l 24 (Gai.) *Nihil est aliud hereditas quam successio in uniuersum ius quod defunctus habuit.* Similarly Julian (ib. 17. l 62); XXIX. 2. l 37 (Pomponius) *Heres in omne ius mortui, non tantum singularum rerum dominium succedit, cum et ea, quae in nominibus sint* (i.e. debts) *ad heredem transeant.* There were however some exceptions to the complete representation of the deceased by the heir. The heir could bring all actions which his predecessor could, except for insult and the like (*iniuriarum et si qua alia similis inueniatur actio*, Gai. IV. 112); and the heir of an *adstipulator* could not bring an action on the stipulation (ib. 113). Actions on torts of his predecessor (*ex maleficiis poenales ueluti furti, ui bonorum raptorum, iniuriarum, damni iniuriae*) could not be brought against an heir, nor could an action on the stipulation be brought against the heir of a *sponsor* or *fideiussor* (ib. 112, 113).

An adoptive father, like a natural father, becomes heir through his adopted son, but otherwise a transference of the position of heir from the heir by right to another person was possible only in one case. The statutable heir, i.e. heir *ab intestato*, could before entering on the inheritance formally surrender it (*in iure cedit*) to another, who then became heir. If the statutable heir once entered on the inheritance he could no longer completely and effectually divest himself of it (Gai. II. 35). Practically however any heir could put another in his place by a sale of the inheritance for a real or nominal price. Legally he remained heir, but, by stipulations entered into between them, the purchaser was bound to guaranty him against the burdens of the inheritance, and the heir was bound to allow the purchaser all the benefits of the inheritance (Gai. II. 252; D. XVIII. 4. See note above on l 12. § 4. p. 90).

By the action of the Praetor an inheritance was also in certain cases transferred in effect wholly or partly to another. Technically the Praetor did not displace the heir but gave the *bonorum possessio* to another and protected him in it. *In omnibus uice heredum bonorum possessores habentur: Bona autem hic plerumque solemus dicere uniuersitatis cuiusque successionem qua succeditur in ius demortui, suscipiturque eius rei commodum et incommodum; nam siue soluendo sunt bona siue non sunt, siue damnum habent siue lucrum, siue in corporibus sunt siue in actionibus, in hoc loco proprie bona appellabuntur* (D. XXXVII. 1. l 2; l 3 pr.).

adrogatorem] If a person *sui iuris*, or, as the Romans would call him, a *paterfamilias*, was to be adopted by another, the procedure was by a bill (*rogatio*) approved by the pontifices and passed by the curiae, who however even in Cicero's time were not really assembled but were represented by thirty lictors (Cic. *Rull.* II. 12. § 31). The form of the bill is given by Gellius (V. 19; cf. Cic. *Dom.* 29) *Uelitis iubeatis ut L. Ualerius L. Titio tam iure legeque filius siet, quam si ex eo patre matreque familias eius natus esset, utique ei uitae necisque in eum potestas siet, uti patri endo filio est. Haec ita uti dixi, ita uos Quirites rogo.* From this procedure came the terms *adrogator* and *adrogatio*, which we first meet with in Gaius and

Gellius. Cicero uses *adoptio* or *adoptatio* of the adoption of a *paterfamilias* as well as of a *filius familias*, and so do the lawyers, frequently distinguishing the former by *adoptio quae per* (or *apud*) *populum fit* from the latter *adoptio quae apud praetorem fit.*

The effect of arrogation was (before Justinian) to transfer as a whole (*per uniuersitatem*) the property and future acquisitions of the person arrogated to his new father. All the children, who were in his power, fell under the same power as himself, and became grandchildren of the adopter of their father (Gai. I. 107; D. I. 7. l 15; l 40). But the loss of civic position (*capitis deminutio*), resulting from the adoption, caused a loss altogether of rights attached to his person, viz. any usufruct vested in him, any services which his freedman had sworn to render him (cf. D. XXXVIII. 1. l 7; l 9) and some others (Gai. III. 83; the text is mutilated). At the same time debts owed by the arrogatee on his own account did not in strict law become chargeable on the arrogator, but dropped altogether. The Praetor however gave the creditors a right, if their claims were not duly satisfied, to obtain payment by selling all the property, that would have been their debtor's, if he had not been adopted. If however the debts were owing by the arrogatee in the capacity of heir to some one else, the arrogator took the burden as parcel of the inheritance, becoming heir in lieu of the arrogatee (Gai. III. 84). Diocletian substituted a rescript of the emperor for the procedure *per populum* (Cod. VIII. 47 (48) l 2. § 1; l 6). Justinian did away with the loss of a usufruct by *cap. dem.* (Cod. III. 33. l 66), and cut down the right acquired by the adoptive (as of the natural) father in the property of the son to a usufruct, and only on the son's death unemancipated gave him the ownership, except in certain cases. If the son was emancipated, the father still retained half the usufruct. The son had in no case the ordinary rights of a proprietor against his father as usufructuary (Just. III. 10. § 2; Cod. VI. 61. l 6; 59. l 11).

A person under the age of puberty could not be arrogated before Antoninus Pius authorised it, and then only under certain conditions and safeguards for the interest of the arrogatee (Gai. I. 102; D. I. 7. l 17; l 18; l 22, &c. XXXVIII. 5. l 13; and see Gell. l. c.).

u. f. in annos singulos legatus] See note above on l 20.

ut supra scriptum est] i. e. *stipulatus est in annos singulos certum aliquid.*

prout, &c.] 'according as the usufruct shall be lost by change of civic position and afterwards be recovered, the right acquired by the stipulation will shift, and after passing to the heir' (who is taken as the proprietor) 'will return to the original fructuary'.

capitis minutione] (*a*) It is difficult to fix the proper or original form of this expression on account of the variety in the MSS. In Gaius the phrase is generally abbreviated to K. D, but when written in full is *kapitis diminutio;* once (III. 27) we have *kapite minuti* (see Studemund's *Apograph.*

p. 274). The Vat. Fragments, §§ 60—64, though much mutilated, appear to agree with Gaius: having several times *diminutio* (for which the Digest often substitutes *minutio*), once (at least) *minutio*. Ulpian and the Florentine MS of the Digest have *deminutio, deminutus, minutio, minui, minutus*. In *Collat.* VI. 3. § 2 *minutio*. The lay writers rarely use the term. According to modern editions we have Cic. *Top.* 4. § 18 *se capite deminuit;* 6. § 29 *capite deminuti;* Liv. XXII. 60. § 15 *deminuti capite;* Caes. *Civ.* II. 32. § 9 *cap. deminutione;* Gell. I. 12. § 9 *capitis minutione*, and so also Tertull. *Spect.* 22; Paul. ap. Fest. p. 70 *deminutus capite*.

(*b*) The origin of the phrase is uncertain. Plautus (e. g. *Men.* 304, *Most.* 266; &c.) has *diminuam caput* of a threat 'to break a person's head' in the literal sense. *Caput* is often used metaphorically of a man's life or personal existence, e. g. in such phrases as *de libero capite iudicare, causam capitis dicere, certamen capitis et famae, accusare capitis* (sc. *iudicio?*), death or banishment being the result, if the accused were condemned (D. XXXVII. 14. l 10). Hence 'head-breaking' (*diminutio*) may have been the original expression, afterwards softened, or perhaps corrupted (as *caput* lost its vivid original meaning, and became a name for a congeries of rights) into 'head-lessening', 'head-abating' (*deminutio* or *minutio*. For this use of *deminuere*, cf. D. XXXIII. 8. l 6 pr. *deminui singula corpora pro rata debebunt*).

(*c*) A man's *caput* or personality as a member of a community, and thereby entitled to legal (non-political) rights, included as its basis freedom, citizenship, and membership of a family. A slave had no *caput:* he was a thing, not a person, and consequently in law had no rights. A free stranger was as such not entitled to marry with, or inherit from, a Roman, to hold property in Roman land, or enter into commercial dealings under the same forms and securities as a Roman. The *ius ciuile* was for Romans only. Further, the Roman state was an aggregate, not of individuals but of families. A member of a Roman family was necessarily a freeman, and as a member was a citizen. There were thus three degrees of 'head-breaking'. Loss of freedom carried with it the loss of citizenship and family-membership: it was *maxima capitis deminutio*. Loss of citizenship but not of freedom was a *minor cap. dem.;* still it carried with it loss of family membership. Loss of this last without ceasing to be free or a citizen was *minima cap. dem.* It was not mere loss either. He lost his place in one family, because he became a member of another. And hence *capitis deminutio* generally (D. IV. 5. l 1; cf. Gai. I. 152) and *minima cap. dem.* in particular (Ulp. 11. § 13) were called *status permutatio*. For *minor cap. dem.* the term *media* is also used (Gai. I. 159; D. IV. 5. l 11); and both the two first-named are called *magna c. d.* (D. XXXVIII. 16. l 1. § 4; 17. l 1. § 8) and *maiores* (Gai. I. 163) in contrast to the last.

(*d*) For *c. d. maxima* see Gaius (I. 160; *Inst.* I. 16. § 1) and the criticism by M. Cohn (*Beiträge*, II. pp. 45—73). *Media cap. dem.* was according to Gaius brought about by the prohibition of the use of fire and water, to which Justinian adds the case of deportation to an island: and Paulus (D. IV. 5. l 5.

§ 1) the case of deserters, and of persons adjudged by the senate or by a law to be public enemies (Cohn, pp. 97—102). *Minima cap. dem.* was caused by adoption, by coemption, by mancipation, and by manumission (Gai. I. 162). Adoption was either of a person *sui iuris* (i. e. arrogation, on which see the note p. 164), or of a *filius familias*, which proceeded by means of mancipation and manumission (Gai. I. 134). Coemption was for three purposes; (1) for marriage, (2) for changing a guardian, (3) for making a will (Gai. I. 113—115). Mancipation and manumission took place in connexion with one another for two purposes, (1) for emancipating a child, (2) for enabling a child (*filius familias*) to be adopted. In order to break the father's power he had to make a fictitious sale (mancipation) of his children or grandchildren to some friendly person, who holding them in technical slavery (*in mancipio*) manumitted them therefrom. But the XII Tables had (apparently in order to put some check on a father's powers) enacted, that, if a father sold his son three times, the son should be free. The lawyers used this for the purpose of effecting adoption and emancipation, and took it literally. A *son* must be mancipated three times. After each of the first two mancipations the son, though set free by his new owner, reverted into his father's power, and only after the third mancipation was the tie dissolved, so that the son could now be claimed by an adoptive father, or be set free altogether. But a daughter and grandchildren were not 'sons', and therefore the XII Tables did not apply, and one mancipation was held to be sufficient to dissolve the father's (or grandfather's) power. (Gai. I. 138; D. XXVIII. 3. l 8. § 1.) It is I conceive to the reiterated processes, necessary in the case of a son, that Gaius refers when he says (I. 162) *Quotiens quisque mancipetur aut manumittatur, totiens capite diminuatur.* But repeated 'head-breakings' are also possible in the case of a woman twice or oftener married by coemption (cf. D. XXXIII. 1. l 22), or twice or oftener changing her guardian. Other cases in which a person would experience more than one *cap. dem.* are possible, e. g. repeated offences leading to loss of liberty or citizenship, with intervening pardons, but this would be rare in one person's life. The cases of mancipation and coemption are a sufficient basis for the practice of conveyancers in suggesting to testators that a usufruct should be left with the precautionary addition '*quotiens capite minutus erit, ei lego*' (D. VII. 4. l 3 pr.), or, which came to much the same thing, with the words *in singulos annos*, &c. (ib. l 1. § 3). Coemption had ceased in Justinian's time (see above note on *quamuis non soleat*); and a simple procedure before the praetor was by him substituted for the mancipations, whether for manumission or adoption (*Inst.* I. 12. § 6; Cod. VIII. 47 (48); l 11; 48 (49) l 6).

(*e*) Why *capitis deminutio* caused a loss of the usufruct is a question which has no authoritative answer. Savigny says that it made the subject into a new man (*System* II. 70). Scheurl treats *cap. dem.* as civil death (cf. Gai. III. 153 *ciuili ratione capitis diminutio morti exaequatur*) which is a stronger expression for the same view as Savigny's (*Beitr.* I. p. 235).

Mandry refers it to the principle that *cap. dem.* put an end to all such claims and obligations, which could not have been established in that person in the position now assumed by him (*Familiengüterrecht*, I. p. 172 sqq.). Cohn regards it as an effect of the non-transferability of a usufruct or use from one person to another (*Beitr.* II. p. 275). In truth a usufruct was originally a special favour or provision for a particular person: it was not a mere piece of property or marketable right, which was given to a person, to be retained or disposed of as he chose. And a 'head-breaking' was even in its less important degrees a change of the economical and social position of a person. Whether adopted or emancipated, whether a wife under her husband's power or a woman with new guardians, the person was differently situated, and therefore so far at least a different subject for rights and obligations. The loss of agnate relationship was thus a type of the change of position; and the rule of law, which sprung from that, received a new justification and a continued acquiescence from the practical circumstances attending in most cases a *capitis diminutio*.

(*f*) The connexion of *capitis deminutio* with the loss of agnate relationship is shewn by its being treated by Gaius, Ulpian (XI. § 9), and Justinian (*Inst.* I. 16) in connexion with the statutable guardianship of agnates. In the Digest (IV. 5) in accordance with the Edict, it comes among other occasions which called for the interference of the Praetor in restoring the equitable position, as between plaintiff and defendant, which had been legally lost owing to duress, fraud, imprudence of minors or other unjustifiable cause.

mox restitutus] 'restored by the terms of the legacy', which, strictly speaking, gave a fresh legacy each year, but might be considered to restore the former legacy lost by *cap. dim.* See note on l 20.

ambulabit stipulatio] 'the stipulation (i.e. the usufruct stipulated for and the right of action, in case it was refused) will shift'. So of successive purchasers (D. IV. 4. l 15) *Ubi restitutio datur, posterior emptor reuerti ad auctorem suum poterit: per plures quoque personas si emptio ambulauerit, idem iuris erit;* of the liability on a tort (ib. 5. l 7. § 1) *Iniuriarum et actionum ex delicto uenientium obligationes cum capite ambulant;* of possession (D. V. 3. l 25. § 8); of *bonorum possessio* (D. XXXVII. 11. l 2. § 9). So *ambulatorius* 'shifting' (D. XXIII. 5. l 10; Cod. VI. 2. l 22. § 16).

ad heredem] i.e. the heir of the testator who left the usufruct, which heir is here presumed to be the owner of the propriety.

§ 3. **quaestionis est**] 'it is a question', or 'matter for inquiry'. So D. XV. 1. l 9. § 6; l 11. § 3; XIX. 1. l 13. § 7; &c.; *illud dubitationis est, an*, &c., D. XXIII. 2. l 46; *rationis est*, ib. l 34 pr.; *moris est*, Quint. I. 10. § 20; *iuris esse*, infr. l. 36 pr., &c.

quod adquiri fruct. non potest] e.g. anything which a slave stipulates for the fructuary otherwise than *ex re fructuarii* or *ex operis suis:* or anything which the slave may gain even *ex re fructuarii* during the interval between the extinction of the usufruct and its re-constitution, as in the

last section. The act of the slave must however not be one in itself null: cf. § 5. The doctrine of the text is also given in D. XLV. 3. l 31 *Si iussu fructuarii aut bonae fidei possessoris seruus stipuletur, ex quibus causis non solet iis adquiri, domino adquirit. Non idem dicetur si nomen ipsorum in stipulatione positum sit*, because the slave would then not have the *animus* to acquire for his master. Cf. ib. l 30. An analogous principle to that here given for the slave in usufruct is given for a slave common to several masters in D. XLI. 1. l 23. § 2 *Illud receptum est, ut quotiens communis seruus omnibus adquirere non potest, ei soli eum adquirere cui potest.*

ex re fructuarii] See note on l 12. § 3 (p. 86).

nominatim proprietario] 'expressly for the proprietor'. A contract made by stipulation was such as the stipulator expressed, if such contract was conformable to the principles of law. If a slave was not in usufruct, and was the property of one person, it mattered not whether he named his master or himself, as the person in whose favour the stipulation was made, or named neither. In any of these cases he gained for his master (D. XLV. 3. l 1 pr.). If he was in usufruct he gained for the fructuary, whether named or not, provided that it was *ex re fructuarii aut ex operis ipsius*, and provided that no one else was named as the beneficiary.

Under the law before Justinian the *proprietarius* might be either *prop. ex iure Quiritium* or *qui in bonis habebat*. The statement in our text would then apply probably only to the latter; Gai. III. 166 *Qui nudum ius Quiritium in seruo habet, licet dominus sit, minus tamen iuris in ea re habere intelligitur, quam usufructuarius et bonae fidei possessor; nam placet ex nulla causa ei acquiri posse; adeo ut etsi nominatim ei dari stipulatus fuerit seruus, mancipioue nomine eius acceperit, quidam existiment nihil ei acquiri.*

iussu eius] A previous order from his master made the master responsible for the slave's action, and therefore naturally made acquisition by the slave to be acquisition by the master. Cf. D. XV. 4. l 1 pr. *Merito ex iussu domini in solidum aduersus eum iudicium datur, nam quodammodo cum eo contrahitur qui iubet. Iussum autem accipiendum est, siue testato quis siue per epistolam siue uerbis aut per nuntium siue specialiter in uno contractu iusserit siue generaliter.* The order of a fructuary would have no such power as against the owner. See below. On the effect of an order by one of several masters of a common slave see Gai. II. 167; D. ib. l 5; l 6; Cod. IV. 27. l 2 (3.) What amounts to an order in the case of entry on an inheritance is discussed by Ulpian D. XXIX. 2. l 25. See also Pernice, *Labeo* I. p. 504 sqq. on the subject generally.

ipsi adquirere] 'acquires for *him*', i.e. *proprietario*. On *ipsi* see above l 22. For the matter cf. D. XLI. 1. l 37. § 5; XLV. 3. l 39, where the question is raised by Pomponius how the fructuary is to recover from the proprietary in these circumstances. He says *Non sine ratione est, quod Gaius noster dixit, condici id posse domino.* Probably the *condictio* would be that called *sine causa* (D. XII. 7).

contra autem nihil agit] The proprietary has a general and

residuary power over the slave and right to the benefit of his actions, wherever the limited right of the fructuary does not come in. And an order from the proprietary of this slave, stating that the slave is acting for him, thus ousts the fructuary, even though the basis be the fructuary's estate or the slave's services. But the reverse is not the case. An order from the fructuary, or an express mention of him by the slave, does not give the fructuary any right, if the basis be the estate of the proprietary. (Cf. D. XLV. 3. l 22 *Seruum fructuarium ex re domini inutiliter fructuario stipulari, domino ex re fructuarii utiliter stipulari;* ib. l 31 *Si iussu fructuarii aut bonae fidei possessoris seruus stipuletur, ex quibus causis non solet iis adquiri, domino adquirit. Non idem dicetur, si nomen ipsorum in stipulatione positum sit.*) There is however a distinction between an order and an express stipulation; an order from the fructuary does not interfere with the proprietary's getting the benefit of what is stipulated for on the basis of the proprietary's estate: but, if this stipulation is in the name of the fructuary, the one neutralises the other, and the result is null; cf. ib. l 30. See ib. l 33, where the position of the *bonae fidei possessor* is again treated, and the reason in the case of an order is given that *iussum domino cohaeret*, 'only the master can give an effectual order'. Of course the fructuary is answerable for his slave's action taken in pursuance of his order (D. XV. 4. l 1. § 8).

§ 4. The case here put is of a slave stipulating for the conveyance of the usufruct in himself. Whether he name the proprietary, or, without naming him, simply stipulate for the usufruct, the proprietary acquires it, in the first case by the force of the stipulation itself, in the other case by the principle that what is acquired by a slave is acquired by his master, cf. D. XLV. 3. l 1 pr.; l 15. It is not said from whom the slave stipulates for this usufruct; possibly from the fructuary; possibly from a third party who, if he could not obtain the usufruct, would have to pay an equivalent.

exemplo serui communis] A slave common to two persons stipulates for a thing which belongs already to one of them: if he stipulates expressly in favour of this one, his act is null: if he names the other, that other acquires the whole (*solidum*) of the thing. If neither of them had been the owner of the thing at first, the acquisition, if not expressed to be for one, comes to both in proportion to their shares in the slave (D. XLV. 3. l 5; l 37).

§ 5. **si seruo fructuarius operas eius locauerit**] 'if a fructuary lets out to a slave, in whom he has the usufruct, the slave's own services, the result is null'. This is because there is no real contract at all. A fructuary's slave hiring his own services from the fructuary, is hiring the fructuary's property from the fructuary (*ne quidem si rem meam*, &c.). What will be the rent? Evidently money acquired by the slave's services. But this is just one of the cases in which the fructuary's slave acquires for the fructuary. The result is that the fructuary (through the slave) is hiring from the fructuary the fructuary's own property and paying for it

with the fructuary's property—obviously a legal nullity. At the end of the section Julian says, that if the slave is expressly acting for the proprietary, the case is different: it is real business, and the proprietary acquires. Presumably an order from the proprietary would have the same effect (cf. § 6 *iussum pro nomine accipimus*). One is inclined to ask, why, if there were no express mention or order of the proprietary, the rule of Julian laid down in § 3 could not apply, the very fact, that the business would be invalid if the slave were presumed to be acting for the fructuary, being sufficient to shew that he was acting for the proprietary. The answer is, I take it, that such a hire of the slave's services by the slave was in practice not an uncommon event. The fructuary allowed the slave to make what he could, reserving to himself only a fixed payment or rent, the remainder being, in other words, allowed to count in the slave's *peculium*. But there was no legally binding obligation, and least of all did the fructuary mean by such an arrangement to bind himself to the slave's proprietary, unless the proprietary was expressly named in the formal contract, or the slave proved an order from the proprietary, on which if necessary the fructuary could sue the proprietary.

et si ex re mea, &c.] This is a general proposition not confined to the case of a fructuary and a fructuary's slave. A slave buying from me with my money, or lending me my own money, cannot bind me to any one. The whole business is null.

seruus alienus bona fide mihi seruiens] The good faith is that of the person *cui seruit*, not of the slave, and so long as this good faith continues, the slave acquires for his possessor on the same conditions only as a fructuary's slave, i.e. *ex re possessoris aut ex operis suis*. And the same applied where the person *bona fide seruiens* was really a free man (Gai. II. 92; III. 164; D. XLI. 1. l 23 pr. and § 1).

Such an occurrence as my having the services of another's slave, believing him to be my own, may arise as with any other chattel, e.g. an heir may have found him on the testator's estate, hired out or deposited with the testator, and may have sold him to me under the belief that he was part of the inheritance (Gai. II. 50; D. XLI. 3. l 36), or he may have delivered him to me in fulfilment of a legacy (cf. D. XLI. 8. l 5; l 6); &c.

idem agendo] 'by doing the same', i.e. *stipulando a me rem meam*. If he gained for any one it would be for his real owner. He cannot gain for me, whom he is actually serving, my own thing, and the same applies to the contract of letting and hiring. Why in such a case he does not gain for his owner may be explained as above in the case of a slave in usufruct. (The statement in D. XLI. 1. l 23. § 2, though confirmed, as Mommsen points out, by the Greeks and better expressed by them, seems to me imperfect and wrong in substance, and not in language such as Ulpian would have used. No slight emendation will put it right.)

ne quidem] See above note on l 15. § 7 fin. p. 126.

fructuario] ablative in apposition to *a me*.

me non obligabit] 'he will not bind me thereby'; i.e. I shall not be responsible on the contract as *locator*. The contract is legally null.

regulariter] 'as a rule'. A word not much used. It is found several times in the Digest, v. 3. 1 9; xv. 3. 1 3. § 2; xxx. 1. 1 71. § 1.

§ 6. **si duos fr. proponas**] i.e. Put the case of two persons (*A* and *B*) jointly having the usufruct of a slave, who by use of the property of one of them, say *A*, contracts with *C*. Does *A* get the whole benefit of the contract? or does it come to *A* and *B*, and if so, in what shares? or does it, or any of it, enure to the benefit of the owner of the slave? Scaevola had, it appears, discussed the same question, only assuming two *bona fide* possessors instead of two fructuaries, and said that it was the common belief (among lawyers) and supported by the logic of the case that *A* gets a share (proportioned to his share of the usufruct), but that the other share does not fall to *A* nor *B*, but to the owner. Clearly the reasoning is this: *A* is not entitled to it, because he is a stranger as regards the second share in the slave, *B* does not get it, because as *bona fide possessor* he can acquire through a slave only so far as he has contributed either some property or the slave's services. And in this case the acquisition being due to the use of *A*'s property only, *B* has no claim, and the excess of the acquisition over *A*'s share will fall to the owner (cf. supr. § 3). If the slave had acted expressly in *A*'s name or by *A*'s order, *A* would acquire the whole. So far Scaevola. Ulpian appears to approve of these opinions and to apply them to the case of the two fructuaries.

But in D. xli. 1. 1 23, Ulpian in a later book of the same treatise quotes Scaevola as saying in the same second book of his Questions exactly the reverse on one point. *Quam speciem Scaeuola quoque tractat libro secundo quaestionum: ait enim, si alienus seruus duobus bona fide seruiat et ex unius eorum re adquirat, rationem facere ut ei dumtaxat in solidum adquirat. Sed si adiciat eius nomen ex cuius re stipulatur nec dubitandum esse ait quin ei soli adquiratur, quia et si ex re ipsius stipularetur alteri ex dominis, nominatim stipulando solidum ei adquiret: et in inferioribus probat, ut quamuis non nominatim nec iussu meo ex re tamen mea stipulatus sit, cum pluribus bona fide seruiret, mihi soli adquirat.* Similarly, Scaevola in his 13th book quoted in D. xlv. 3. 1 19. One of the Greek commentators (*Anonymus*) on Bas. xvi. 1. 1 25 notices the discrepancy between our passage and that in D. xlv. and proposes to get rid of it by taking that to relate only to the case of the slave acting in the name or at the order of the one. A possible explanation seems to be that suggested by Fuchs (*Krit. Stud.* 1867, p. 15 foll.) that Scaevola altered his mind in the 13th book, and that the extract in D. xli. originally stood *in partem adquirat*, and lower down *at* for *et*. Fuchs thinks that *at* being accidentally altered to *et* led the copyist (ignorant of D. vii. 1. 1 25. § 6) to alter *partem* to *solidum*. I should

rather be disposed to think that the words *uulgo creditum* which do not appear in the other passages contain some clue to the discrepancy; and that both opinions were stated by Scaevola, one as commonly believed and the other as logically correct; and that the compilers have in our passage insufficiently corrected the text. (See the next note.)

Why Scaevola changed his mind (if his second and thirteenth book really contained different decisions) is another question. Perhaps because it was simpler to hold that the whole was acquired by the person whose property was employed in getting it, than that the otiose owner got part which afterwards he would have to give up to the *bona fide possessor* (cf. D. XLV. 3. l 39). On looking more closely at Ulpian's words in our passage, it will be seen that they are very cautious and do not really say more as regards the fructuary than that whatever is the law as regards two possessors in good faith will be law also for two fructuaries, and that so far as in any case the fructuary does not acquire, the owner will.

partem—domino] Ulpian has evidently written this carelessly, or more probably the compilers have made havoc of it: as it is dependent on *hoc facere ut*, we ought to have *pars ei.....quaeratur pars domino.* Ulpian has expressed it as if it were dependent directly on *ait;* or perhaps originally these words depended on *uulgo creditum*, and *rationem efficere* introduced a different view see (the last note). The subjunctive is found rightly in the corresponding passages, D. XLI. 1. l 23. § 3 (*ait rationem facere.....ut.....adquirat*) and XLV. 3. l 19 (*ratio facit ut..... adquirat*); and Stephanus has it right even in our passage (*τὸ εὔλογον ἀπαιτεῖ ἵνα...μέρος αὐτῷ προσποριοθῇ*). Another piece of similar carelessness is found a few lines lower down.

accipimus] 'we take', i.e. 'interpret', 'consider to be'. So D. XXXII. l 73. pr., and often.

erit dicendum ut .....erit quaesitum] *ut* requires *sit quaesitum.* But *ut* itself is a doubtful usage after *idem erit dicendum.* We should have expected an infinitive object-sentence.

quaeri ei] sc. *proprietatis domino.*

ostendimus] supr. § 3.

§ 7. **diximus**] In l 21, which is from the previous book of Ulpian's Commentary.

posse adquirere] sc. *seruum*, i.e. that a slave can acquire for the person who has the usufruct of the slave (but only) in two cases, viz. if the slave is using for the purpose the fructuary's property (e.g. lending his money, selling or hiring out his land or goods, &c.), or using (e.g. hiring out) his own services.

utrum tunc locum, &c.] The subject was introduced in l 21 by the case of a legacy (*si serui u. f. sit legatus*), though that passage being taken from the 17th book of Ulpian's Commentary on Sabinus and this from the 18th, one cannot lay much stress upon the point. But the fact,

that it was a question deserving of consideration whether the competence of a fructuary to acquire through the medium of a slave existed only in the case of a usufruct created by legacy, seems to imply that bequest was the original mode in which usufructs came to be established, and the same conclusion may be drawn from Gaius' words in l 2. (cf. l 6).

per traditionem] It is probable that this is one of Tribonian's alterations for *per in iure cessionem uel mancipationem* (see above on l 3. pr. *pactionibus* p. 38), though perhaps it is not necessary to suppose it (cf. Vangerow, *Pand.* I. p. 757). In the days of the classical jurists there were four ways of establishing a usufruct by the civil law: (*a*) by a legacy *per uindicationem*, (*b*) by surrender in court, (*c*) by a reservation on a mancipation, (*d*) by adjudication in a partition suit. Of these only surrender in court was available as a voluntary conveyance *inter uiuos* for all things whether *mancipi* or *nec mancipi*. And the form of legacy *per uindicationem* was restricted (before Nero, Gai. II. 197) to things belonging to the testator in full civil ownership. Moreover, neither were lands in the provinces capable of surrender in court, nor were foreigners capable of so creating a servitude or holding it so created. Hence two substitutes came into use.

1. A personal obligation was created in lieu of a real right. Instead of the stiff bequest by *do lego* came a flexible obligation imposed on the heir (*per damnationem*), or the still more flexible *fideicommissum*, and instead of the formal conveyances by handtake or surrender in court resort was had to bargains and stipulations (see note pp. 36, 38). Thus servitudes could be practically constituted between foreigners and Romans and in provincial lands. The jurisdiction would be at Rome in the *praetor peregrinus*, in the provinces it would be in their respective governors.

2. But this did not properly meet the case of a neglect of the due formalities at Rome and in Italy. As with the transfer of property, so with the creation of these limited rights, delivery was often used when mancipation or surrender in court ought to have been used; and these sometimes even when used were not effectual, because the creator had a flaw in his title, or the intended acquirer was not legally capable, or the thing was not one conveyable by exclusively Roman conveyances. The Praetor however interfered and granted the protection of the court to any conveyances made in good faith and for sufficient ground. Hence arose two classes of servitudes, those constituted *iure legitimo*, and those constituted *per tuitionem praetoris* (D. VII. 4.1 1. pr. *Parui refert utrum iure sit constitutus ususfructus an uero tuitione praetoris; proinde traditus quoque ususfructus, item in fundo uectigali uel superficie non iure constitutus, capitis minutione amittitur* (Vat. Fr. 61, which is much mutilated, includes the case of provincial lands); 9. l 9. § 1; XLIII. 18. l 1. §§ 6— 9). Delivery in the case of a usufruct would be either induction into an estate, or actual

delivery of the slave or other chattel *utendi fruendi causa* (D. VII. 9. l 12), or acquiescence on the part of the owner in the actual exercise of his right by the usufructuary (which latter mode was indeed all that was possible in the way of delivery of other servitudes, supr. l 3. pr.; D. VIII. 1. l 20). The usufructuary had under the usual conditions the right to the *actio Publiciana* (D. VI. 2. l 11. § 1 *Si de usu fructu agatur tradito, Publiciana datur; itemque seruitutibus urbanorum praediorum per traditionem constitutis uel per patientiam (forte si per domum quis suam passus est aquae ductum transduci): item rusticorum, nam et hic traditionem et patientiam tuendam constat;* VIII. 3. l 1. § 2; VII. 6. l 3).

In Justinian's time there would be left (cf. p. 36) the three modes enumerated in our passage, viz. legacy (without distinction of form), delivery (which had swallowed up mancipation and surrender in court, and had come to be regarded in the above named sense as applicable to servitudes), and bargains. There was also adjudication, which however was only applicable in special circumstances, and *longi temporis praescriptio* (see note on l 17. § 2, *usucapio*, p. 138). These two (and perhaps also the statutable usufruct of a father in his son's property, Cod. III. 33. l 17) are included under *alium quemcunque modum*.

Ulpian's original text of our passage would have probably contained *per mancipationem uel in iure cessionem*. Whether it included *per traditionem* is very doubtful. In Vat. Fr. 47a Paulus says expressly *ciuili actione (usus fructus) constitui potest, non traditione, quae iuris gentium est;* and Gaius (II. 28) denies absolutely the application of delivery to incorporeal rights, and, what is stronger, makes no mention in the succeeding sections of any establishment of a usufruct by any such mode. Gaius' denial is of course strictly accurate. A right cannot be delivered: and in order to remove the ambiguity of a delivery of land or a chattel to the usufructuary some formal declaration or agreement is necessary. But whatever preceded, whether mancipation, or surrender in court, or bargains and stipulations, or bequest in a will, there would follow (cf. p. 36) delivery of the thing to be enjoyed, or at least acquiescence by the owner in the exercise of the right by the person entitled to the easement. And this *traditio* or *quasi traditio* was the basis of the Praetor's protection, and availed even when informalities had occurred. (*de usufructu tradito* in D. VI. 2. l 11. § 1; cf. VII. 4. l 1. pr., I take to be a loose expression for *de re tradita utendi fruendi causa*, cf. VII. 9. l 12.) But, looking to the positive language of Paulus and the significant omissions of Gaius, it does not seem probable that Ulpian here named *per traditionem* as a constituent mode of creating a usufruct, and ranged it with *legatum* and *stipulatio*, and presumably with *mancipatio* and *in iure cessio*.

omni fructuario adq.] 'that any and every fructuary, be his title what it may, acquires in this way'. So also Bas. *παντὶ τῷ τὴν χρῆσιν ἔχοντι*; and Steph. *προσποριζεσθαι ταῦτα τῷ ὁπωσδήποτε γενομένῳ οὐσουφρουκταρίῳ*. The MSS. have *omnia*. For the singular *omnis* cf. D.

XXXVI. 1. l 15. § 5 *non omnis autem suspectam hereditatem cogere potest adiri, sed is demum, ad quem*, &c.; XXX. l 77 *ab omni debitore fideicommissum relinqui potest* ('may be charged on any debtor').

l 26. **us. fr. interierit**] i.e. by the fructuary's death, or 'head breaking', or non-user, or expiration of time for which usufruct was granted.

quod superest ad prop. pertinebit] When the lessor sold the property leased, or when in any other way his right in the property came to an end before the expiration of the lease, the lease also came strictly to an end, the lessee having as a rule his action (*ex conducto*) against the lessor for his breach of contract (D. XIX. 2. l 25. § 1; l 33; Cod. IV. 65. l 9). The lessee could not be forced to continue the occupation (D. ib. l 32), but continuance on the part of both parties even without express agreement operated as a renewal (l 32; l 13. § 11; l 14). A fructuary (or his heir), if the lease was ended by the loss of the usufruct, was liable only if he had represented himself as the owner (l 9. § 1). The case in the text is however distinguished from ordinary cases, where the intended duration of the lease may be in excess of the leasing power, by the fact that the slave can act as an agent of the proprietor as well as of the fructuary (see above, l 25. § 2), and thus the lease enures to the benefit of the fructuary until the usufruct lapses, and then shifts to the proprietor for the remainder of the term (*quod superest*). A usual period for a lease of land was five years (*quinquennium*, l 9. § 1; l 24. § 2, § 4; *lustrum*, l 13. § 11), probably on the precedent of the censor's letting of public lands and taxes.

'Apportionment' does not mean more than 'assigning a part' and therefore is not open to the objection which Wächter (*Erört.* I. p. 79) makes in the case of the German *Vertheilung* 'division between two or more persons', viz. that it is properly applied only to such a case as that in our text, where the lease continues, notwithstanding the change in the person who has the leasing power. In other cases, e.g. where a fructuary has himself leased a farm or a house or a slave's services, the lease is at an end by the lapse of the fructuary's right. The proprietor can if he likes turn out the lessee, and enjoy the land, &c. himself, or make such new terms as he chooses. And so with a sale of the land leased, if the lease is not noticed in the contract of sale. The question of apportionment of rent will in any case arise in this form. What can the fructuary legally claim from the lessee, if the lease or the fructuary's interest in it lapse before the full term of the contract? The answer is, that it depends on whether the rent or wages or other periodical payment of the lessee is remuneration for the lessee's taking the natural produce of the thing let, or for the lessee's use of the thing (Wächter, l.c.; Elvers, p. 436). In the first case, e.g. an agricultural farm, the fructuary can claim only the produce gathered while the usufruct lasted. If it be gathered, it, or the lessee's payment in respect of it, belongs to the fructuary, though the day for

payment may not have arrived before the usufruct expired (below l 58. pr.). In the second case, e.g. a house or slave's services, the fructuary can claim payments rateably to the time which the usufruct has lasted (D. XIX. 2. l 9. § 1 *tenetur colonus, ut pro rata temporis, quo fructus est, pensionem praestet*). This last rule applies also to the case in our text. Whether the broken period was reckoned by days or months or otherwise is not stated. Probably it would depend, in the absence of any statement in the contract, on the nature of the thing and the custom of the country. In English law, as now settled by statute "All rents and other periodical payments in the nature of income shall, like interest on moneys lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly" (Williams' *Real Prop.* p. 30). This mode of reckoning would in the absence of any specific provision of periods for payment seem naturally to apply to the hire of a slave's services, which were technically equivalent to 'a day's work'. See note on l 12. § 3 (p. 88).

From the next sentence implying a contrast (*sed et si*) we may assume this first sentence of l 26 to be concerned with a lease of the slave's services for a certain time with periodical payments. Steph. treats it as a lease for five years at a fixed yearly salary, which is the case put above in l 25. § 2, and XLV. 3. l 18. § 3.

sed et si ab initio certam, &c.] The same rule will hold if the contract be for one lump sum for a fixed number of days' work. Then as the number of days' work performed before the lapse of the usufruct is to the whole number of days' work named in the contract, so is the amount claimable by the usufructuary to the whole fixed payment. So Steph., treating the contract as one for five years at a fixed sum for the whole period.

Some wax tablets found in Transylvania, included in *Corp. I. L.* III. p. 921 sqq. contain, amongst other agreements, some for services in the gold mines. Three, less mutilated than others, are given in Bruns, pp. 210, 211. In each case a lump sum is stated as the hire for a definite period, one of some months, one apparently of more than a year. Payments are to be made at intervals (*per tempora*, or *suis temporibus*), with penalties for failure to work and for failure to pay.

capite deminuto eo] 'if he is *capite deminutus*', *eo* of course being the fructuary, and the looseness of expression being very likely due to omissions from the text of Paulus by Tribonian. Mommsen suggests the insertion between *deminuto* and *eo* of *fructuario mortuoue*, so as to bring in the case of death as well as of *cap. dem.* Such a fuller statement would no doubt have been an improvement. On *capitis dem.* see above note on l 25. § 2 (p. 165).

l 27. **pendentes...maturos**] See notes on l 12. § 5 (pp. 91, 92).

feret] See note on l 12. pr. (p. 79).

die legati cedente] 'when the legacy vests'.

(*a*) When the person who is entitled to a legacy is ascertained, *dies cedit*, 'time runs': when the legacy becomes payable, *dies uenit* (*uēnit?*) 'the time is come'. The two dates are sometimes identical, sometimes different. As a rule a legacy vests at the death of the testator (according to the *lex Papia Poppaea*, on the opening of the will, Ulp. XXIV. 31), i.e. whoever is then the person named as the legatee is entitled to it, and, if he dies, his heir can claim it. It will not however be payable, unless and until the testator's heir has entered on the inheritance, that being essential to the will duly taking effect. A legacy *in diem* or *ex die*, i.e. expressly bequeathed to a person on or from a future time, vests at the death of the testator, but is not payable till the prescribed time arrives. A legacy on condition does not vest till the condition is fulfilled, and hence, if the legatee dies before this, the legacy lapses altogether: the legatee's heir can claim nothing (D. XXXVI. 2. l 5; l 21). A legacy of a usufruct did not vest till the inheritance was entered on: as it could not be transmitted to the legatee's heir, time did not move till the legatee could at once begin *uti frui*. If the usufruct was given from a future date, or upon a condition, there would of course be a further postponement till the arrival of the date or the fulfilment of the condition (ib. l 5. § 2; VII. 3. § 3). It was the same with all legacies to slaves (Vat. 55): they were often coupled with manumission, and, as manumission only took effect on the inheritance being entered on, legacies to slaves did not vest before that. Otherwise they would vest while he was yet a slave, and therefore would enure to his master, not to him (D. XXXVI. 2. l 5. § 7; l 7. § 6; l 8).

(*b*) The origin of the phrase *dies cedit* is not certain. It is applied chiefly to legacies, but also occasionally to freedmen's services (D. XXXVIII. 1. l 23. § 1; cf. l 34 *dum languet libertus, patrono operae quae iam cedere coeperunt, pereunt*); to time of mourning (*tempus cedit* D. III. 2. l 8); to the year allowed for bringing an action (*annus cedit* D. III. 6. l 6; IV. 6. l 28. § 4; III. 24. l 15. § 4); to the time for accepting an inheritance (*dies cretionis cedere* Gai. II. 10); or for claiming *bonorum possessio* (D. XXII. 6. l 1. § 1; XXXVII. 1. l 14); or for being excused from public duties (D. L. 5. l 4); to stipulations, when the event causing a forfeiture commences (D. XLVI. 7. l 13. pr.) cf. L. 16. l 213 *'Cedere diem' significat incipere deberi pecuniam: 'uenire diem' significat eum diem uenisse, quo pecunia peti possit. Ubi pure quis stipulatus fuerit, et cessit et uenit dies: ubi in diem, cessit dies sed nondum uenit: ubi sub condicione, neque cessit neque uenit dies, pendente adhuc condicione.* I have not seen anywhere the application of the phrase to usucapion.

Probably the meaning of the phrase is 'the day moves', 'passes', 'goes': i.e. the right or claim was before only in embryo, a mere possibility: now it becomes a question of time; the day moves its first step (*dies cedit*): eventually it actually comes (*dies uenit*).

adhuc pendentes deprehendisset] 'should have found them still

hanging'. They do not become his, till he has gathered them, but if they are yet ungathered, he has it in his power to make them his. If they had been separated from the ground by someone else (not acting for him), the property would already have passed away. Cf. D. VII. 4. l 13, and above l 12. § 5.

stantes] See note on *pendentes* l 12. § 5 (p. 92).

ad fructuarium pertinent] 'belong to him', but only in this sense, that he can make them his own by gathering. Cf. D. XXII. 1. l 25. § 1 *Cum ad fructuarium pertineant fructus a quolibet sati, quanto magis hoc in bonae fidei possessoribus recipiendum est, qui plus iuris in percipiendis fructibus habent? cum fructuarii quidem non fiant, antequam ab eo percipiantur, ad bonae fidei autem possessorem pertineant, quoquo modo a solo separati fuerint.*

§ 1. **dominus]** i.e. the owner who has granted the usufruct. See note on l 13. § 5 *paterfamilias* (p. 108).

tabernis, &c.] 'to use the shops (of which he has granted the usufruct) either for his goods, or for carrying on any business'. Ulpian in commenting on the edict, which gave the *actio tributoria* (see below on l 31) against any one *si scierit seruum peculiari merce negotiari,* says *Licet mercis appellatio angustior sit, ut neque ad seruos fullones uel sarcinatores uel textores uel uenaliciarios pertineat, tamen Pedius scribit ad omnes negotiationes porrigendum edictum* (D. XIV. 4. l 1. § 1).

It was common in Rome and other places to have sheds attached to the outside of the houses, and such *tabernae* were used for a variety of purposes. Thus the house of Pansa at Pompeii has on three sides shops and small lodgings, and among them a bakery (cf. l 13. fin.; XXXIII. 7. l 15. pr.); one of these only communicates with the house. (Of course *tabernae* might be independent buildings.) The encroachments of shopkeepers on the streets are declared by Martial VII. 61 to have made Rome into one big *taberna.* See Becker's *Gallus* ed. Göll, II. p. 282.

utique] 'of course'. The fructuary is not bound only to use them himself. He may let them; and may let them for a different class of goods from those for which the testator used them. Cf. l 9. fin.

illud solum obseruandum] 'this rule however must be kept, viz. that the fructuary must not exercise his right of usufruct either in a way alien to its proper nature and limitations, or so as to be an insult or outrage', probably to the proprietary or to the memory of the testator.

abutatur] See above note on l 15. § 1 (p. 117).

contumeliose iniurioseue] These words are much discussed in connexion with the *actio iniuriarum* (D. XLVII. 10). See note below on l 66. Exactly what usage would be held to be insulting and outrageous may not be easy to define. Stephanus illustrates *abutatur* by making the *tabernae* into a stable, and *contumeliose iniurioseue* by making them into a brothel. No doubt something of this sort is meant; cf. D. XVIII. 7. l 6. pr.

§ 2. **cuius testator quasi,** &c.] 'whose empty (or 'idle') service, if I

may say so, the testator was wont to use'. *Uacuus* is apparently opposed to trained or skilled service and special charge. *Quasi* is an apology for the expression, but one would have expected the order to have been rather *cuius quasi uacuo ministerio.* Stephanus has *οἰκέτου ψιλὴν καὶ μόνον ὑπηρεσίαν εἰωθότος τῷ δεσπότῃ ποιεῖν.*

disciplinis uel arte instituerit] 'has given him education or professional training'. *Disciplinae* is a general word for schooling, and the plural emphasizes the variety of subjects of instruction. Cf. Quintil. VIII. 3. § 75 *ut terram cultu, sic animum disciplinis meliorem uberioremque fieri;* Suet. *Gram.* II; Colum. IV. 3. § 2; D. XXVII. 2. l 2 (of a guardian's claims for reimbursement) *si dicat impendisse in alimenta pupilli uel disciplinas;* of a slave, XIX. 1. l 13. § 22. *Arte* will refer here to training for a particular profession, e.g. as physician, actor, singer, gymnast, &c. So we have *seruus arte fabrica peritus* (D. XXXIII. 7. l 19. § 1); *ars medica* (XXXVIII. 1. l 25. § 2); *ars pantomimi* (ib. l 27); &c.

§ 3. **cloacarii nomine**] All rates and taxes or other charges fell upon the usufructuary, if accruing during his enjoyment. Such as had accrued due before, were payable by the heir of the testator. See l 7. § 2 notes (p. 62). *Cloacarium* is only mentioned here and in D. XXX. l 39. § 5 *Heres cogitur legati praedii soluere uectigal praeteritum uel tributum uel solarium uel cloacarium uel pro aquae forma.* Stephanus says *ἐπιγινώσκειν τὸν οὐσουφρουκτιάριον χρὴ καὶ οἴκοθεν διδόναι, ἅπερ ὀφείλει ἤτοι εἰώθει δίδοσθαι περὶ τὴν ἀνακάθαρσιν τῶν ὀχετῶν ἢ τῶν δημοσίων ὅλκων. ὁ γὰρ κεκτημένος πλήσιον τῶν δημοσίων ὀχετῶν οἴκους ἀναγκάζεται ὡς ἐπὶ τὸ πλεῖστον τούτους ἀνακαθαίρειν.* 'The usufructuary is bound to recognise and provide at his own charge what ought to be, or usually is, given in respect of the cleansing of the sewers or of the public watercourses'. The further statement that the neighbouring occupiers have as a rule to clear the sewers, as they have (Stephanus proceeds) to clean and care for the aqueducts and the public roads, is not mentioned so far as I can find elsewhere. In Justinian's time the cleansing of the sewers and watercourses and control of buildings, &c. belonged to the bishop and principal inhabitants: both trust funds and public moneys are named as applied to the defrayal of such expenses; and an imperial auditor (*discussor*) was occasionally sent to inspect, but without power of charging fees or imposing taxation (Cod. I. 4. l 26; X. 30. l 4).

ob formam aquae ductus] (*a*) *Forma* is a general term denoting the trough or channel of the aqueduct, i.e. the inclosing structure of the water. Frontinus *Aq.* 126, after speaking of the damage caused by the neighbours to the aqueducts by planting trees too near, goes on *Deinde uicinales uias agrestesque per ipsas formas dirigunt,* 'they make occupation- and farm-roads along the (outside of the) aqueducts; ib. 75 *Plerique possessorum, e quorum agris aqua circumducitur, subinde formas riuorum perforant,* i.e. 'tap the aqueducts for their own purposes'. Probably *forma* was used specially of a brick or stone-built conduit, cf. Anon. (M. Cetius Faventinus? Teuffel, *Gesch.* § 264 ed. Schwabe) *de diuers. fabr. arch.*

(appended to Rose's edition of Vitruvius) 6 *Ductus autem aquae quattuor generibus fiunt, aut forma structili aut fistulis plumbeis aut tubis uel canalibus ligneis aut tubis fictilibus. Si per formam aqua ducitur, structura eius diligenter solidari debet, ne per rimas pereat. Canaliculus formae iuxta magnitudinem aquae dirigatur.* Vitruvius in the passage on which this is founded uses (for the first genus) the term *riuis per canales structiles* (VIII. 7. init.). An inscription at Cora (1779, Wilmanns) records that some magistrates *aquam caelestem dilabentem montibus collectam interciso aggere per formam cur(a) sua factam in piscinis repurgatis longo tempore cessantibus p(ecunia) p(ublica) perduxerunt.* Cf. Cod. Theod. XIV. 6. l 3 *Calcis autem uehationis* ('carting of chalk') *ita sit ratio partita, ut mille quingenta onera formis, alia sartis tectis annua deputentur;* ib. XV. 2. l 5 *Eos, qui aquae copiam uel olim uel nunc per nostra indulta meruerunt, eius usum aut ex castellis aut ex ipsis formis iubemus elicere, neque earum fistularum, quas matrices uocant, cursum ac soliditatem attentare,* i. e. from the reservoirs and main channels, not from the subordinate pipes; (this law is greatly confused by being amalgamated with the next in Cod. Just. XI. 43. (42) l 3); ib. l 8; l. 9. A *comes formarum*, president of aqueducts, is mentioned in the *Notitia Dignitatum.* But the most important passage for our text is ib. l 1 (=Cod. Just. XI. 43. (42) l 1) 330 A. D. *Possessores, per quorum fines formarum meatus transeunt, ab extraordinariis oneribus uolumus esse inanes, ut eorum opera aquarum ductus sordibus oppleti mundentur, nec ad aliud superindictae rei*[1] *onus iisdem possessoribus attinendis, ne circa res alias occupati repurgium formarum facere non occurrant.* So an extract from 'Mago and Vegoia' in the Gromatici, p. 349, Lachmann. *Aquarum ductus per medias possessiones diriguntur, quae (qui?) a possessoribus ipsis uice temporum repurgantur: propter quod et leuia tributa persoluunt* (where *leuia* is probably, 'light' in comparison with the usual tribute).

(*b*) What the payment was which is named in our text is not quite clear. In D. XXX. l 39. § 5 (quoted in last note) we have a payment *pro aquae forma.* In XIX. 1. l 41 Papinian says *In uenditione super annua pensitatione, pro aquaeductu infra domum Romae constitutum, nihil commemoratum est,* where Mommsen suggests *intra* and *constituto.* Perhaps *constituta* may be better. Frontinus (*Aq.* 118) says the expenses of the public establishment for the care and repairs of the aqueducts were defrayed from rents (*uectigal*) imposed on occupiers of land or buildings adjoining the canals and reservoirs. Stephanus takes our passage to refer to a payment for cleansing. Certainly a fixed rent imposed on the neighbouring occupiers, by way of commutation for an ancient duty of cleansing the aqueduct, seems the most likely meaning; but a water-rent would also suit the passage of Papinian. It is not very probable that Frontinus referred to rents paid by occupiers of surplus lands, bought by the state when constructing the aqueducts, for these were, he says, sold again (§ 128).

[1] Godefroi explains this by *cuiuscunque superindicti*, i. e. 'of any other tax'. Perhaps it is a Greek genitive 'other than the above-named tax'.

si quid ad collationem uiae] 'anything that may be payable for a highway rate'. Cf. D. XIX. 1. l 13. § 6 *Si qua tributorum aut uectigalis indictionisue cuius (quid* Flor.) *nomine aut ad uiae collationem praestare oportet, id emptorem dare facere praestareque oportere;* L. 4. l 14. § 2 *uiarum munitiones, praediorum collationes non personae sed locorum munera sunt;* 5. l 11 *praediorum collatio uiae sternendae.* Cod. VIII. 13. (14) 16 *In summa debiti computabitur etiam id quod propter possessiones pignori datas ad collationem uiarum muniendarum praestitisse creditorem constiterit.*

Collatio is used sometimes of the total amount raised: e.g. the amount raised to pay off the Gauls is called *tributo collatio facta* (Liv. VI. 14. § 12; cf. IV. 60. § 6); sometimes of the quota of each person; e.g. *plerique omnem collationem palam recusabant* (Suet. *Ner.* 44). It is frequent in the imperial times, e.g. Cod. Theod. XI. 5. l 4; 7. l 14; 17. l 4; &c. The corresponding verb *confertur* is used in the next line.

On the maintenance of roads, cf. Sicul. Flac. (Grom. p. 146, ed. Lachm.) *Sunt uiae publicae quae publice muniuntur et auctorum nomina optinent; nam et curatores accipiunt, et per redemptores muniuntur, et in quarundam tutelam a possessoribus per tempora summa certa exigitur. Uicinales autem, de publicis quae deuertuntur in agros, et saepe ipsae ad alteras publicas perueniunt, aliter muniuntur per pagos, id est per magistros pagorum, qui operas a possessoribus ad eas tuendas exigere soliti sunt: aut, ut comperimus, unicuique possessori per singulos agros certa spatia adsignantur, quae suis inpensis tueantur;* Dig. XLIII. 8. l 2. § 22 where the test of a road being private is its having been constructed *ex collatione priuatorum*, whereas if it be repaired *ex coll. priu.* it may be public all the same; Cod. Theod. XV. 3. l 2 (A.D. 362) *In muniendis uiis iustissimum aequitatis cursum reliquit auctoritas. Singuli enim loca debent quaeque sortiri ut sibi consulant uel negligentia uel labore. Igitur eos loca iuxta morem priscum delegata curare oportebit.* Cf. Kuhn, *Verfassung des röm. Reiches* I. p. 62. In Rome the house-owners were bound to repair, or pay for the repairing of, the public roads in front of their house: *Lex Iul. municip.* (Bruns p. 96 sqq.) 7—13.

quod ob transitum exercitus, &c.] 'what is contributed out of the produce on account of the passage of troops'. Sicul. Flac. (p. 165 ed. Lachm.) *Quotiens militi praetereunti aliiue cui comitatui* (any official suite) *annona publica praestanda est, si ligna aut stramenta deportanda, quaerendum quae ciuitates quibus pagis huiusmodi munera praebere solitae sint.* Nothing more specific seems to be known. Soldiers carried their rations with them, but were allowed to receive from their hosts, though forbidden to take by force, oil, wood and bedding, cf. Cod. Theod. VII. 4. l 5; 9, &c.; Cod. Just. XII. 37. But these constitutions are of the fourth century; and at different times in the various provinces rules for the provisioning of the troops on march may easily have taken the shape of requiring the occupiers of the district to provide rations, and perhaps of crediting them with the value as paid on account of taxes. The *possessores* were required or allowed sometimes to pay their taxes, or part of them, in kind. Cf.

Hygin. *Gram.* p. 205. (See Marquardt, *Staatsverw.* II. p. 224 foll.) Such a method of provisioning troops or officers in transit was prescribed by Justinian in the 130th Novel as a universal rule. In earlier times we have a reference, not indeed to supplies being made to an army on the march, but to troops being quartered for the winter and requisitions being made by the magistrates. For the *lex Antonia de Termessibus* (A. U. C. 683, Bruns p. 86) forbids (cap. 5) soldiers being quartered for the winter on the inhabitants of the free and allied community of Thermeses in Pisidia, or the magistrates making any further requisitions on them than were authorized in the *lex Portia* (the details of which are unknown; cf. Liv. XXXII. 37).

si quid municipio] sc. *debeatur.*

possessores] 'occupiers of land, land-owners'. Besides the technical sense of *possessor* as distinguished from 'owner' (D. L. 16. l 115) *possessor* (*possessio, possidere*) is often used in a more popular sense, as we in English speak of the possessors of land, and possessions in land, meaning owners of and property in land. Cf. D. L. 16. l 78 *Interdum proprietatem quoque uerbum possessionis significat, sicut in eo qui 'possessiones suas' legasset, responsum est;* XI. 4. l 1. § 1 *Senatus censuit ne fugitiui admittantur in saltus, neque protegantur a uilicis uel procuratoribus possessorum.* So security for appearance in court was not required from *possessores rerum immobilium*, and Macer goes on to define who for that purpose come under this term (D. II. 8. l 15) *Possessor is accipiendus est, qui in agro uel ciuitate rem soli possidet aut ex asse aut pro parte. Sed et qui uectigalem, id est emphyteuticum, agrum possidet possessor intellegitur. Item qui solam proprietatem habet, possessor intellegendus est: eum uero qui tantum usumfructum habet, possessorem non esse Ulpianus scripsit...Si fundus in dotem datus sit, tam uxor quam maritus propter possessionem eius fundi possessores intelleguntur....Tutores, siue pupilli eorum siue ipsi possideant, possessorum loco habentur;* XXVII. 9. l 5. § 10 *ne propter modicum aes alienum magna possessio distrahatur;* XLIX. 18. l 4 *Uiae sternendae immunitatem ueteranos non habere rescriptum est: nam nec ab intributionibus quae possessionibus fiunt ueteranos esse excusatos palam est;* L. 15. l 4. § 2; l 5. pr.; Cic. *Agrar.* III. 4. § 15 *Siluam Scantiam uendis: populus Romanus possidet: defendo. Campanum agrum diuidis: uos estis in possessione: non cedo. Denique Italiae Siciliae ceterarumque prouinciarum possessiones uenales ac proscriptas hac lege uideo: uestra sunt praedia: uestrae possessiones.* So, frequently in the Gromatici, of persons to whom land had been assigned as property; e.g. p. 130 *in agro diuiso continuae possessiones et adsignantur et redduntur;* p. 201 *adsignare agrum circa extremitatem oportet, ut a possessoribus uelut terminis fines optineantur;* pp. 49, 50, 51, &c. (Cf. Savigny, *Recht des Besitzes* § 8. p. 104 ed. 7). In the arrangements of the later empire the tax payers are distinguished into two classes *possessores* and *negotiatores*, 'landowners and traders', the former paying according to the extent and cultivation of their land, the latter paying according to the

amount and value of their total property. Hence the position of *possessores* in such expressions as Cod. Theod. IX. 27. l 6 *si quis forte honoratorum, decurionum, possessorum, postremo etiam colonorum, aut cuiuslibet ordinis;* XIII. 9. l 4 *possessoribus uel senatoribus uel priuatis;* Nov. Valentin. III. 6. l 2. § 1 *senatores uel uniuersos possessores,* &c. See Kuhn's *Verfassung* I. 271; Marquardt, *Staatsverw.* II. p. 227.

certam partem fructuum uiliori pretio addicere] Kuhn (*Verfassung* I. p. 64) is probably right in referring (as Noodt *de usufr.* I. cap. 9 had previously suggested) to this arrangement the passage in D. L. 3. l 18. § 25 *Praeterea habent quaedam ciuitates praerogatiuam, ut hi, qui in territorio earum possident, certum quid frumenti pro mensura agri per singulos annos praebeant: quod genus collationis munus possessionis est* ('is a duty falling on landed property'). Nothing else appears to be known of the arrangement.

addicere is used of the judge assigning an insolvent judgment debtor to his creditor, e.g. Liv. VI. 15. § 9; Cic. *Flac.* 20. § 48; Quintil. VII. 3. § 26; of the assignment of the goods (in place of the person) of the same, e.g. Cic. *Uerr.* I. 52. § 137; Gai. III. 79; of similar action of the Praetor in the formal *in iure cessio*, e.g. Gai. II. 24: or in adoption, e.g. Gai. I. 134; or in appointing a judge, e.g. D. v. 1. l 39; l 46; l 80; or arbiter X. 2. l 30; of an auctioneer knocking down the thing to a bidder, e.g. Cic. *Caecin.* 6. § 16; Suet. *Iul.* 50; *Lex Uipasc.* 9. p. 142 Bruns; of a seller making over the property, only on condition that no better offer is made by a certain day (called *addictio in diem*), e.g. D. XVIII. 2. l 4. § 1 *seruis uenditis et in diem addictis.* Also metaphorically, 'give up', 'hand over', e.g. Cic. *Pis.* 24. § 56 *Uendebas auctoritatem huius ordinis, addicebas tribuno pl. consulatum tuum; Uerr.* Act. I. § 12; *Planc.* 39. § 93 *senatus, cui me semper addixi;* &c., cf. D. XLI. 1. l 30. § 3. In our passage it seems to mean nothing more than *uendere:* cf. D. LI. 18; 8. l 7 (5) *Decuriones pretio uiliori frumentum quod (quam?) annona temporalis est patriae suae, praestare non sunt cogendi;* in XLVIII. 11. l 3 *uendere* is used in the same context.

fisco] We should say 'to the Crown'. Baskets were used to convey money in Cicero's time, *Uerr.* Act. I. 8. § 22; Act. II. 3. 79. § 183. The application of *fiscus* to the imperial treasury is not without analogies in English, e.g. the 'Privy Purse' and the 'Exchequer' (from the table-cover like a chess-board). It is necessary to distinguish five things in imperial times. 1. *Aerarium*, called for distinction *aerarium Saturni* (from being kept in the temple of Saturn), the public treasury under the control of two *praefecti.* It received the taxes from the provinces which were under the senate. In and after the 3rd century those taxes came to the *fiscus*, and the *aerarium Saturni* became only the treasury of the city of Rome. 2. Augustus established an *aerarium militare* to furnish pensions to veterans. It was supported by the succession duty of 5 per cent. (*uicesima hereditatum*), and the duty of 1 per cent. on sales (*centesima rerum uenalium*). It was managed by three *praefecti.* 3. The *fiscus* was the emperor's treasury which received the taxes from the imperial provinces, the proceeds of the

domain lands in all the provinces, the goods of condemned persons and other items. Out of this exchequer were defrayed the expenses of the army and navy, of the military roads, the post and public buildings, and the supply of corn to the City. It was under the control of a *procurator a rationibus*, also called *procurator fisci*, and from Diocletian's time *rationalis* (D. I. 19) and eventually *comes aerarium largitionum*. The *fiscus* belonged to the emperor, the *aerarium* (theoretically) to the people, but eventually the distinction dropped. Pliny speaks of it as real (*Paneg.* 36); Tacitus as of no consequence (*An.* VI. 2); Dio Cassius (LIII. 22) says he cannot distinguish them: Justinian treats them as identical (*Inst.* II. 6. § 14) and has doubtless often substituted *fiscus* for *aerarium* in the Digest. 4. The *patrimonium Caesaris* was the private property of the emperor derived from mines and other monopolies and from inheritances, but also including the revenues of Egypt (Tac. *H.* I. 11), such as in other provinces passed to the *aerarium* or *fiscus*. This was managed by *procuratores* and treated as crown property, passing to the imperial successor, not to the private heirs. 5. *Res priuata*, separated from the *patrimonium* by Severus, with a separate *procurator* appointed to manage it, comprised such property as the emperor disposed of by will. See Marquardt, *Staatsverw.* II. 292 foll.; Mommsen, *Staatsrecht* II. 952 foll.; Hirschfeld, *Verwaltungsgeschichte* I. 1 foll.

fusiones] This word (except in the literal sense of 'pouring', 'melting') occurs only in Cod. Theod. XI. 28. l 6 where a relaxation from payment of arrears is granted to Africa by Honorius *usque in initium fusionis quintae*, which is taken to mean 'to the end of the fifth taxation' (=*indictio*, on which see Savigny, *Verm. Schr.* II. 130; Marquardt, *Staatsverw.* II. 237). Bas. has *καὶ τὰ δημόσια τέλη ὁ τὴν χρῆσιν ἔχων δίδωσιν.* Steph. after speaking of the occasional duty of selling cheaply to the city, adds *εἰώθασι δὲ καί τινας πράσεις εὐώνους πρὸς τὸν φίσκον ποιεῖσθαι· καὶ χρὴ καὶ τὸ ἐντεῦθεν βάρος ἐπιγινώσκειν τὸν οὐσουφρουκτουάριον· δίδωσι δὲ καὶ τὰ δημόσια τελέσματα, ὡς μανθάνεις*, &c., referring to l 7. supr. Mommsen takes the first part of this to refer to *fisco fusiones praestare*. The inferior MSS. have *functiones* (for *fusiones*), a word often used in the codes of a public duty, and specially of a public tax, e.g. Cod. Just. IV. 49. l 13 *Fructus post perfectum iure contractum emptoris spectare personam conuenit, ad quem et functionum grauamen pertinet;* VII. 39. l 6, &c. It is difficult to account for *fusiones* in the Flor. MS.: otherwise *functiones* is a much more probable word for Ulpian to have used.

§ 4. **si per stipulationem seruitus debeatur**] Hasse (*Rhein. Mus.* I. p. 103) takes this of an obligation on the heir to constitute a servitude, the obligation arising from a formal promise of the testator. Jhering (*Jahrbücher* X. 560) takes it of a servitude already constituted by a stipulation on the part of the testator or other previous owner. The expression *seruitus debetur* seems a perfectly natural one to use in the former case; D. VIII. 4. l 6. fin. is probably an instance; D. XLVI. 4. l 13. § 3, which Hasse quotes, may or may not be one. In the latter case the expression is fre-

quently used (e.g. D. VIII. 2. l 17. § 3; 3. l 23. § 3; l 34. pr.; XLI. 1. l 20. § 1). In practice there would often be little difference between the two, as a promise to constitute a servitude would probably be treated as sufficient without any further proceeding, just as in England an agreement for a lease or partnership, &c., is often acted on, without the deed ever being drawn or executed. Our passage seems so parallel to the question discussed by Marcellus in VIII. 4. l 6 that I take it the testator had promised to grant a servitude, and Ulpian gives it as his opinion (*puto dicendum* is in l. c. *putat permittendum*), that the fructuary must permit the servitude to be exercised. Indeed the heir would have a right to impose it formally before putting the fructuary into his right (D. XXX. l 116. § 4), and would not have to compensate the fructuary, for the usufruct would be held to have been bequeathed subject to that condition.

On the general question of constituting a servitude by stipulation see on l 3. pr. (p. 38).

§ 5. **si seruus sub poena,** &c.] Occasionally certain conditions were imposed when a slave was sold. Four such are specially treated of; (*a*) that the slave should, after a certain time, or on arriving at a certain age, be set free; (*b*) that a woman should not be prostituted; (*c*) that the slave should not be set free; (*d*) that the slave should be removed and should not return to a particular place. See the titles D. XVIII. 7; Cod. IV. 55—57. In all these cases a pecuniary penalty (*sub poena*) for breach was sometimes stipulated: but in the first case the slave became free without the purchaser's act at the time stated. This was by a constitution of M. Antoninus (D. XVIII. 7. l 10; XL. 8; Cod. IV. 57. l 2; l 3). The pecuniary penalty was apparently not exigible, the object being already secured (D. XLV. 1. l 122. § 2; Cod. IV. 57. l 6). In the second case the seller stipulated either for the right of resuming property in the slave (*abducendi potestas*), or for the slave's becoming *ipso facto* free: and freedom was declared by the Praetor, if the seller consented to the prostitution (D. XL. 8. l 7; Cod. IV. 56. l 1). In the third case the law came in aid, and nullified any manumission contrary to the condition, but an action for the penalty did not lie on the stipulation, but it did *ex uendito* (D. XVIII. 7. l 6; Cod. IV. 57. l 5; D. XL. 1. l 9. § 2.; 9. l 9. § 2). In the fourth case the usual stipulation was that, if the slave came and stayed in the prohibited district with the purchaser's consent, the seller should have the right *manus inicere* or *abducere*, i. e. to resume the property. If the purchaser set the slave free, the crown claimed him as slave (Vat. Fr. 6; Cod. IV. 55. l 1). This condition was intended for the protection of a master from a violent slave, and could be remitted by the seller (D. XVIII. 7. l 1; Vat. Fr. 6). Cf. Jhering, *Jahrb.* X. 547, 548; Glück XVII. 199 foll.

interdictis certis quibusdam] ἐπὶ τῷ κωλύεσθαί τινων Bas. ἐπὶ τῷ μὴ ἐπιμεῖναι αὐτὸν τῷ τόπῳ Steph.; in accordance with which latter Godefroi understands *locis*. But I see no reason for restricting the general words of our law. Any negative condition is included, though practically of usual

conditions those forbidding residence in a particular place are chiefly within the purview. *Ne manumittatur* and *ne prostituatur* are out of the question, because a fructuary had no power to manumit, and prostitution would be a breach of the general rule *ne abutatur* (l 15. § 1). A condition that the slave should be removed from his own city (*de ciuitate sua*) carried with it an exclusion from Rome also; and exclusion from a particular province carried with it exclusion from Italy also (D. XVIII. 7. l 5; Cod. IV. 55. l 5).

If a pecuniary penalty was bargained for (in a case of prohibited residence), Papinian at one time thought it could be enforced in an action on the sale, only if the stipulator was himself liable pecuniarily on the same condition. 'Revenge was not a good consideration'. But Papinian afterwards came over to Sabinus' opinion, that the penalty was claimable apart from this, because the price must be held to have been diminished by the insertion of the condition. In the Digest we have Papinian's retractation in XVIII. 7. l 6. § 1 to which the original opinion is appended as l 7 (Glück XVII. p. 210).

alioquin, &c.] 'otherwise (i.e. if he do not keep the conditions) he is not exercising his right of usufruct, as a good man would think right', and therefore is liable to the proprietary for any loss thereby incurred. See l 9. pr.

l **28.** Old gold and silver coins, so described, are evidently intended not for use as money, but for some other purpose, e.g. for ornament or curiosity. If they were money, they would not be susceptible of usufruct in the proper sense, but only of the quasi-usufruct sanctioned by a senate's decree (D. VII. 5). If however coins cease to be fungible, i.e. to be convertible at pleasure for the same quantity of the same genus, a proper usufruct is possible. They then become almost 'medals'. Thus *nomismata* with the special example of *filippi* (cf. Hor. *Ep.* II. 1. 234 *rettulit acceptos, regale nomisma, philippos*) are reckoned not as money, but as *aurum uel argentum signatum* (D. XXXIV. 2. l 27. § 4). Cf. Suet. *Aug.* 75 *Saturnalibus... modo munera diuidebat uestem et aurum et argentum, modo nummos omnis notae, etiam ueteres regios ac peregrinos* (Noodt I. cap. 4). A doubt may also have been felt whether such things have any proper 'use' or 'produce'. See below l 41.

quibus pro gemmis uti solent] What the precise use 'in place of jewels' was we do not know. Doneau (*Comm.* X. 3. § 14) and others suggest use as buttons; Noodt (followed by Glück IX. 175) suggests collections of coins. Other uses are conceivable, e.g. insertion in metal cups (cf. Cic. *Uerr.* IV. 27, 28); or use as earrings, &c. But the point is quite immaterial. The material point is that the coins should be sought or used for their own sake as individuals, and not as mere representatives of value.

solent] i.e. 'men in general are wont'. Cf. *Lat. Gr.* § 1428.

l **29. omnium bonorum us. fr.**] Two meanings of this sentence are possible: either that there is no part of a man's property of which he cannot bequeath the usufruct (cf. *omnium praediorum* l 3. pr.; *omni fructuario* l 25. fin.), or that a bequest of a usufruct in the whole of a man's

property is allowable. But the former meaning would be better expressed by *omnium rerum* as in D. VII. 5. l 1; l 3; XXXIII. 2. l 32. § 2. The latter is the true meaning; first because *bona* is a standing expression for a man's property as a whole (cf. D. L. 16. l 49; l 208; *bonorum possessor, bonorum emptor;* D. XXXVII. 1. l 3. pr. *bona hic, ut plerumque solemus dicere, ita accipienda sunt uniuersitatis cuiusque successio*); secondly because the following clause (*nisi excedat dodrantis aestimationem*) is referable only to the property as a whole. Bas. translates *πάντων τῶν πραγμάτων*; but Steph. *πάσης αὐτοῦ τῆς οὐσίας* 'all his property'. The expression occurs in Cic. *Caecin.* 4. § 1 *usum et fructum omnium bonorum suorum Caesenniae legat. Omnium bonorum* is equivalent to *uniuersorum bonorum* (l 34. § 2), *uniuersarum rerum* (Ulp. XXIV. § 25); *totius patrimonii* (ib. § 32); *bonorum* (D. XXXIII. 2. l 24; l 37; l 43; XXXV. 2. l 69). An analogous use is seen in *societas omnium bonorum* (D. XVII. 2. l 1; l 3. § 1; l 52. § 17; § 18); *uniuersorum bonorum* (l 63. pr.); *totorum bonorum* (l 67. § 1); *uniuersarum fortunarum* (l 73). The two meanings are connected. If a usufruct is bequeathed in the whole of a man's property, there must be a usufruct or something analogous in each item of it, i.e. a usufruct *omnium rerum quas in cuiusque patrimonio esse constaret* (D. VII. 5. l 11), *omnium quae in bonis sunt* (D. XXXIII. 2. l 1); and due security must be given by the usufructuary not only for the restitution *in specie* of things not consumable but also for the restitution *in genere* of money and other things consumable.

In the content of a *us. fr. omnium bonorum* were included *nomina* i.e. debts due to the deceased, especially regular investments (*kalendarium*); and debts due from the deceased were first deducted (D. XXXIII. 2. l 24. pr.; l 32. § 9; l 37; l 43; cf. XVII. 2. l 3; L. 16. l 39. § 1; l 83; and next note).

nisi excedat dodrantis aestimationem] 'unless the value of the usufruct exceed the value of three-fourths of the testator's property'. Bas. strangely translates *dodrantis τοῦ ὀκταουγκίου* (i.e. *bessis*, 'two-thirds'), but Steph. has rightly *τοῦ ἐνναουγκίου*. For the general provisions of the *lex Falcidia*, which are here alluded to, see note on l 5 (p. 45).

Stephanus raises the question, how the usufruct could possibly exceed three-fourths the value of the whole inheritance. He answers that the property may have consisted entirely in slaves and animals, which in the course of time would die or become worthless, so that the propriety would be worth nothing. But it is not necessary to resort to such suppositions to find a usufruct of the whole inheritance worth more than three-fourths the fee. In an extract from Macer (D. XXXV. 2. l 68) we have the rules on which the value of a usufruct was computed, viz. at a certain number of years' purchase of the annual value, the number varying with the age of the usufructuary at the commencement. The greatest number given is thirty years, and even if the usufructuary was a municipality, and therefore entitled to enjoy the usufruct for 100 years (D. XXXIII. 2. l 8), still the value was reckoned at 30 years' purchase only. Unless therefore the fee was reckoned as worth at least 40 years' purchase, the municipality would have

to suffer abatement of its usufruct, if the heir was to have his Falcidian fourth. 40 years' purchase presumes the rate of interest to be 2½ per cent. only, a rate of which an example is indeed found in the *tabulae alimentariae* (see note on l 7. § 2, p. 64), but 5 and 6 per cent. were more common rates, and both are also found in such calculations (see same note). In D. xxxv. 2. l 3. § 2 the value of an annuity is said to be such a sum as at 4 per cent. would yield the amount of the annuity, i.e. 25 years' purchase. And in Capit. *Anton. P.* 2, 4 per cent. is called the lowest rate of interest. Cf. ib. *Alex. Seu.* 21. § 2. At any higher rate than 2½ per cent. a legacy of a usufruct of all the testator's property to a municipality would have to suffer abatement. But, besides municipalities, a usufruct left to any one under the age of 20 years was reckoned by Ulpian at 30 years' purchase, and the same value was very commonly extended, according to Macer, when the age was under 30 years. If we assume a rate of 4 per cent., a usufruct of all the property left to any one under the age of 40 or 41 years would exceed in value three-fourths of the fee.

Several questions arise to which it is not easy to give answers. (*a*) If a usufruct and an annuity are left to a corporation, is the annuity to be valued at 25 years' purchase according to D. xxxv. 2. l 3. § 2, and the usufruct at thirty years' according to l 68. pr.? If interest be reckoned at 4 per cent. the present value of the fee simple is no more than 25 years' purchase, and therefore is not more valuable than the annuity reckoned as in l 3, and less than the usufruct reckoned as in l 68.

(*b*) Even where the period of usufruct is not fixed, but depends on the life or non-diminution of *caput* of an individual, the value of the reversion must be very small, if the life be young. In the case supposed in our text the heir gets nothing but the reversion, possibly very remote. Is this enough to satisfy the *lex Falcidia*, or practically to induce the heir to enter (cf. l 73. pr.)? In such a case and also in the preceding one, it seems reasonable to suppose that, if not by the law, still by the force the heir can put upon the legatee, the method of a division of the usufruct would be resorted to, and the heir would have his fourth or, if the reversion be taken into reckoning, at any rate, some share of the annual proceeds. Indeed it seems that those methods of calculation (l 3. § 2; l 68) are only intended, when there are several legatees, and some value must be put upon all, in order to estimate the whole amount bequeathed and make a fair proportionate abatement (cf. l 1. § 9).

(*c*) Suppose this done, is the value so set final, even if the usufructuary live longer than the estimated period, and thus practically get more than three-fourths, and the heir get less than his statutable minimum share of the inheritance? L 47, dealing with annuities, apparently decides that the estimate of value is merely provisional, and that in the case supposed the heir would eventually be able to claim reimbursement of the excess (cf. Arndts in *Rechts-Lex.* vi. p. 332), and the heir can in view of such a contingency demand previous security (l 1. § 16). An annuity

does not drop on *capitis deminutio* occurring to the recipient. But if a usufruct were in question, the opposite case might occur, and the fructuary might, in consequence of (say) 20 years being assumed for calculating the value of his interest, have suffered a larger abatement than was really required.

(*d*) In l 55 another mode is given for estimating the value, viz. what it would sell for, but we are not told when this method should be adopted. An intending purchaser, no doubt, besides the customary calculation of value would have regard also to the health and prospects of the fructuary or annuitant.

Keller (*Pand.* § 578) with others leaves to the judge the decision, according to the particular case, which principle of valuation should be adopted, and whether provisionally or absolutely. A variety of opinions are given in Matthiae, *Controvers. Lex.* Theil. II.; *Erbrecht* s. v. *Quarta Falcidia*, XIII. sqq.

The principle on which the scale given by Ulpian in l 68 is framed is not declared, but appears to be simply the probable length of life of persons of the ages named, and the interest of money seems not to be an element in the calculation. The present worth of the annuity is thus put considerably higher than it would be taken by a modern actuary. This was an error in favour of the heir, and, as the protection of the heir's interest was the object of the *lex Falcidia*, to err on this side was probably intentional. Two writers in the *Assurance Magazine*, Fred. Hendriks, Vol. II. p. 223 (1852); and W. B. Hodge, Vol. VI. p. 313 (1857)[1], have, after careful examination of the table, come to this conclusion. Mr Hendriks compares it with Dr Price's table XLVI., giving the result of "the first deductions ever made on the value of life in a city by comparison of the deaths at all ages for a certain length of time, with the enumerated population living at corresponding ages and exposed to the risk of mortality." The table is based on the mortality at Stockholm from 1755 to 1763, and gives the expectation of life separately for males and females, which vary from one another by ·3 to nearly 7 years. The mean, as Mr Hendriks points out, comes very fairly near to Ulpian's table. I give a table shewing this mean at different ages, and also some extracts from Willich's tables for comparison with the Roman tables.

In this table the number of years' purchase according to Ulpian and Macer, for each age not given, is the same as that of the next given younger age. The value (in the abstract, apart from special circumstances) of the reversion expectant on the death of the annuitant may be obtained in the modern (i.e. the Carlisle) table by deducting the given number of years' purchase from 25 years, if interest be reckoned at 4 per cent., and

[1] I am indebted for these references to my friend Mr Geo. Humphreys, Actuary of the Eagle Insurance Company, who has also calculated for me the Stockholm Expectations in the subjoined table for the ages of 41—44, and 46—49, which are not given in Mr Hendriks' paper.

Age completed	Years' purchase according to		Expectation of Life (mean of males and females)		Years' purchase according to Carlisle table for Annuity on Life.	
	Ulpian	Macer	Stockholm	Carlisle	4 per cent.	5 per cent.
Birth	30	30	16·17	38·72	14·28	12·08
5	30	30	34·08	51·25	19·59	16·59
10	30	30	33·00	48·82	19·58	16·67
15	30	30	30·08	45·00	18·95	16·23
20	28	30	26·93	41·46	18·36	15·82
25	25	30	24·10	37·86	17·64	15·30
30	22	30	21·70	34·34	16·85	14·72
35	20	25	19·60	31·00	16·04	14·13
40	19	20	17·43	27·61	15·07	13·39
41	18	19	17·03	26·97	14·88	13·24
42	17	18	16·64	26·34	14·69	13·10
43	16	17	16·25	25·71	14·50	12·96
44	15	16	15·86	25·09	14·31	12·80
45	14	15	15·47	24·46	14·10	12·65
46	13	14	15·08	23·82	13·89	12·48
47	12	13	14·70	23·17	13·66	12·30
48	11	12	14·31	22·50	13·42	12·11
49	10	11	13·92	21·81	13·15	11·89
50	9	10	13·53	21·11	12·87	11·66
55	7	5	11·59	17·58	11·30	10·35
60	5	?	9·57	14·34	9·66	8·94
65	5	?	7·89	11·79	8·31	7·76
70	5	?	5·98	9·18	6·71	6·33
75	5	?	4·24	7·01	5·24	4·99

from 20 years if interest be reckoned at 5 per cent.: e.g. the reversion expectant on death of a man aged 30 is worth 8·15, or 5·28, years' purchase respectively. (In practice modern actuaries adopt a different mode of calculating the commercial value of a reversion.)

est uerius] 'is the better opinion'. A common expression: cf. Gai. III. 183; 193; 194; IV. 1; 60; D. XLI. 2. 1 1. § 16, &c. Some doubt is implied: what was the point of the doubt here? Probably whether all parts of the inheritance were capable of being subjects of a usufruct. At least the same expression is used in the same or a similar discussion in D. VII. 5. 1 3 *Post quod (senatusconsultum) omnium rerum usus fructus legari poterit. An et nominum? Nerua negauit: sed est uerius, quod Cassius et Proculus existimant, posse legari.*

1 30. **binas aedes**] 'two houses', the distributive numeral being used, because *aedes* in this sense ('set of hearths' or 'chambers'='house') has no singular (*Lat. Gr.* I. p. 443, v. 3; cf. § 331). The same expression is found in D. VIII. 2. 1 10; 1 35; 1 36; 4. 1 6. § 2, &c. In D. VIII. 4. 1 6. pr.; XXXIII. 3. 1 4 we have *duas aedes* in same sense, as is shewn by *alteras*, not *alteram*, following in both places.

posse heredem] The case put is one of a simple legacy of the usufruct, without the testator imposing a servitude on the other house, as he

might have done either by express words (supr. l 19. pr.) or by necessary implication (D. XXXIII. 3. l 1).

Marcellus scribit] The passage of Marcellus referred to is in D. VIII. 2. l 10.

alteras altius tollendo] Every person is able to do what he likes in raising or lowering or altering his own house, unless his house is subject to a servitude in favour of another. *Cum eo, qui tollendo obscurat uicini aedes, quibus non seruiat, nulla competit actio* (D. VIII. 2. 19; cf. Cod. III. 34. l 8; 19). The servitude *ne aedes altius tollantur* is spoken of as a *ius non tollendi*, i. e. a right in the dominant house, that the neighbour should not raise his house. But a *ius tollendi* is also spoken of (Gai. II. 31; D. VIII. 2. l 2, &c.) as a servitude (and similarly a *ius non auertendi stillicidii* as well as a *ius auertendi*). It is not easy to account for what is apparently part of the regular rights of an owner being treated as a servitude. Two explanations are given, (1) that the *ius tollendi* is a special privilege by which a neighbour is bound to waive in favour of another the claim he has by any general restrictions on buildings in towns to prevent such higher erections. (So Wächter, *Pand.* § 158, Beil. II. and others.) (2) That after a house has been subject to a servitude *ne altius tollantur*, it can only recover its freedom by a contrary servitude being imposed on the dominant house. Hence the *seruitus non tollendi* is removed by a *seruitus tollendi*. (So Vangerow, § 342, n. 3, and others.) Neither explanation is very satisfactory.

officere luminibus] The MS. reading *obscurare luminibus* must be wrong, as the verb is transitive. The origin of the error is clear, if the extract from Marcellus' Digest in D. VIII. 2. l 10 is looked at. In the statement of the question to Marcellus the words are *heres aedes alteras altius tollit et luminibus tuis officit*. In the answer of Marcellus the words are *non dubium est quin heres alias possit altius tollendo obscurare lumina legatarum aedium;* and lower down *sed ita officere luminibus et obscurare legatas aedes conceditur, ut non penitus lumen recludatur sed tantum relinquatur quantum sufficit habitantibus in usus diurni moderatione*. Some copyist has confused the two phrases *officere luminibus* and *obscurare lumina*. Either will do in our passage. I prefer *officere luminibus* because *obscurare* is so likely to have been substituted by some one who sees it occur twice in our passage immediately after. Were it not for the extract from Marcellus, *obstruere* would be an easy correction for *obscurare*. See above l 13. § 7, and note there (p. 112). Perhaps, however, *obstruere* is more suited to actual blocking up of windows than to the prejudicial effect of other erections, and *officere* is perpetually used in the Digest in the sense required. Bas. has σκοτίζειν τὰ φῶτα which looks like *obscurare*, but Steph. ἐμποδίζειν τοῖς φωσι with σκοτισθέντα used afterwards, which I take to indicate that Steph. read *officere luminibus*.

The comparison of our passage with the extract from Marcellus shows

that when a writer says *Marcellus*, &c. *scribit*, we cannot conclude that he gives the exact words of the author referred to. The substance is here accurately given.

quoniam, &c.] The principle is that the heir must not neutralize the gift of his testator by rendering the house of the fructuary uninhabitable, but, subject to this, he can do with his property what he chooses.

quod usque adeo temperandum est] 'which right of raising his own house and obscuring his neighbour's must be so moderately exercised that, &c.'

l **31.** (*a*) This law is ludicrously out of place between l 30 and l 32, if the connexion of the thought be regarded. But the place was really determined by totally alien considerations. It is an extract from Paul's 10th book on Sabinus and consequently comes after the extracts from the third book.

(*b*) The purport of the law is that '*ex re fructuarii*' includes not merely the fructuary's own goods managed by the slave, but also the slave's *peculium*, whether it consisted of gifts from the fructuary or of money allowed him to use, or of the slave's savings. Legally the *peculium* still remained part of the property of the fructuary: practically it was the slave's, and the acquisitions made out of this *peculium* would belong in the same way. This double aspect of the *peculium* shewed itself from several points of view. As regards dealings with third parties it was the slave's property and was answerable for the slave's debts; *quasi patrimonium liberi hominis peculium serui intellegitur* (D. XV. 1. l 47. fin.; l 32. pr.). He could even have business with his master as if there were no domestic relation between them; purchase and sale, letting and hiring, pledge and suretyship, gift and loan, all might take place between the slave and his master or third party; just as between one *paterfamilias* and another (ib. l 47. § 6; l 49; cf. XXXIII. 8. l 22. § 1; XL. 7. l 14). On the other hand, the *peculium* existed, both as a whole, and as regards any particular things in it, only so long as the master willed (ib. l 4. pr.; l 8). But he could not withdraw it so as to defraud the slave's creditors (l 21). He had however the right as between himself and other creditors of the slave, of deducting payment in full of his own debt, unless the slave was carrying on a particular trade with the master's knowledge. In that case the master could only claim his proportion (D. XIV. 4. l 1. pr.; l 5. § 7). Actions for and against the slave were brought in the master's name (XV. 1. l 44). As the slave might also be acting not for himself but on behalf of his master, this fact if proved made the master responsible, not merely to the limit of the *peculium* but as for a debt of his own. If the master's own estate had been enriched, the suit was *de in rem uerso* (XV. 3); if the debt was on the master's guaranty, it was *quod iussu* (XV. 4); if the slave was merely the manager of a trade carried on for his master, or was the captain of his master's ship, the master was

of course wholly responsible in the *actio institoria* (XIV. 3), or *actio exercitoria* (XIV. 1). But where the slave was concerned for himself, the action was in form against the master *de peculio* (XV. 1), or if the matter related to some special trade of the slave's, it was *actio tributoria* (XIV. 4). On the death of the slave the *peculium* fell back as it were into the master's property, unless he allowed it to go to the slave's relatives or assignees. On his being set free or alienated, the *peculium* remained with the master, unless expressly stated to accompany the slave (D. XVIII. 1. l 29; XIX. 1. l 38. pr.; XL. 1. l 6). The right of action however remained with the creditors for a year (D. XV. 2. l 1). If a slave was in usufruct, he might have a *peculium* belonging legally to the proprietary and another belonging to the fructuary (l 2); but the creditors were not bound by this distinction, and if the one *peculium* was not sufficient, they could come upon the other (XV. 1. l 19; l 32. pr.; l 37. § 3). The proprietary and fructuary could enforce their claims on the slave, each against the other (ib.).

(*c*) The slave was not justified in squandering the *peculium*, and therefore was held not competent to do so; he could not make presents, even though he had expressly (cf. l 7. § 1) free management allowed him (D. XXXIX. 5. l 7; cf. XIV. 6. l 3. § 2). It is indeed doubtful whether and how far *libera administratio peculii* really gave fuller powers than those of ordinary prudent management (Mandry *Familiengüterrecht* II. pp. 103—106). But management would include power of alienation in the ordinary way of business, and such alienation would be valid (D. XV. 1. l 48; VI. 1. l 41. § 1).

(*d*) The sources of the *peculium* may conveniently be referred to the heads named in our text. 1. Gift by the master (in our case represented by the fructuary). The gift must be executed in the usual way by delivery or definite separation of the thing given (D. XV. 1. l 8). In the case of a slave in usufruct or the property of more than one owner, the gift may be made with either of two intentions, i.e. either that it should form part of the slave's *peculium* belonging to the giver, or that it should pass either to the fructuary, or to the proprietor or (partly) to the coproprietor (above l 22; XLI. 1. l 37. § 1). 2. The slave may have received the thing from elsewhere—a gift, or legacy, or inheritance, or profit on commercial transactions, or hire for his services, &c. Legally this becomes at once the property of his master (or under circumstances of the fructuary, &c.), but the master may allow him to retain it as part of his *peculium*, l 7. § 1; l 49. (cf. Mandry, pp. 123—125). 3. The slave may save something out of his master's payments to him for clothing, or food, or lodging, &c. (cf. XV. 1. l 39; Seneca, *Ep.* 80. § 4 *peculium suum, quod comparauerunt uentre fraudato, pro capite numerant*). From whatever source it was acquired, the *peculium* was often applied to purchase the slave's liberty. Legally, of course this only meant that the master (or his heir) set him free, but retained part or the whole of his *peculium*, D. XL. 1. l 4. pr.; XXXIII. 8. l 8. § 3; § 7. On the bequest of a *peculium* see D. XXXIII.

8. There is a good account of the *peculium* in Pernice's *Labeo*, I. p. 121 sqq. See also Marquardt *Priv. Alt.* p. 160; Mandry, l. c.

ei] sc. *seruo.*

eius] sc. *fructuarii*, dependent on *rerum.*

compendii] depends on *quod.*

l **32. unas aedes**] 'one house' the plural of *unus* being used in such expressions, only where a plural substantive expresses what is conceived as one thing; cf. *binas aedes* l 30, and *Lat. Gr.* I. p. 442. The words '*quas solas habet*' are added merely to emphasize *unas*, 'one house only'. The same qualifications apply also to *fundum.*

tradit] Perhaps originally '*mancipat*'. See Gai. II. 30; 33; Vat. Fr. 47, and note on l 3. pr. (p. 38). For the general law see D. VIII. 4. l 6.

excipere] 'except from the conveyance', 'reserve'. Cf. infr. l 36. § 1; D. XIX. 1. l 21. § 6 *qui domum uendebat, excepit sibi habitationem donec uiueret;* XVIII. 4. l 2. § 12 *Si uenditor hereditatis exceperit seruum sine peculio;* ib. 1. l 77; XIX. 1. l 17. § 6, &c. In the same sense are used *detrahere* (below l 36. § 1; Gai. II. 33); *deducere* (Gai. l. c.; Vat. Fr. § 47); *recipere* (below l 36. § 1, where see note p. 208).

id quod personae, non praedii est] This emphatic expression is perhaps due to the fact that Pomponius' 33rd book related to rights and easements connected with land. At least all the fragments from it as collected by Hommel (except one, D. XXII. 5. l 11) have this connexion. But such rights could be created only in favour of another estate; and that estate must be the creator's own, not a stranger's. Consequently a man delivering the only estate which he owned, could not reserve any predial right, for he had no estate left which it could serve (D. VIII. 4. l 1. § 1; l 6. pr.). But a personal servitude he might reserve. Such are *usus fructus* and *usus, habitatio* being only a special form of *usus*, and *pastio*, as here used, a special form of *ususfructus.*

pascere] A *ius pascendi* is mentioned among rural servitudes in D. VIII. 3. l 1. § 1; l 3. pr.; l 4; l 6. § 1. In l 3 the pasturage is clearly a predial servitude *ut boues per quos fundus colitur in uicino agro pascantur.* In l 4 Papinian says, if the estate of the owner of the servitude is mainly a cattle-breeding farm, the *ius pascendi* and *ius ad aquam appellendi* are servitudes to his estate rather than to himself, but that if the testator's words described a particular person as entitled, the heir or purchaser (of the estate) will not have a right to the servitude. Stephanus draws a distinction between a herd kept for the value of its produce and one kept merely to provide manure for an estate. A right of pasturage in the former case is personal, in the latter predial. In our passage it cannot be predial, for the servitude owner has no estate: he has parted with the property in a mountain pasture, retaining to himself merely the right of pasturing his herd there. Pasturage applies to sheep, goats, swine, oxen, horses, asses and mules (cf. Varr. *R. R.* II. 1. § 12, § 16).

inhabitare] A right of residence differed little as regards its contents from *usus domus* (*effectu idem paene est* D. VII. 8. l 10. pr.). Presumably therefore the person entitled could reside with his relations and dependents, could receive guests, could even let part if he continued to reside there himself. He could not give (*donare*) the right to others. If nothing was said, the right was for life. It did not however pass to the heir, nor on the other hand was it lost by non-use or by *capitis deminutio* (ib. also § 3). Reservation of right of residence for the vendor or others on sale of a house is mentioned in D. XIX. 1. l 13. § 30; l 21. § 6; l 53. § 2.

perciperetur] This ought to be *percipiatur*. In a mountain pasture (*saltus*) the principal produce (*fructus*) would be grass, and would be gathered (*percipiatur*) by the sheep or cattle turned in to feed.

temporali] The inferior MSS. have *temporalis* which Mommsen approves, though Stephanus supports the Florentine reading. As a word beginning with *s* follows *temporali* the proposed change is very easy, and properly no doubt the restriction of time affects *habitatio* not *exceptio*. But a reservation of a temporary right of residence might so readily be spoken of as a temporary reservation that I see no necessity for deserting the Florentine reading. Of course this *temp. exceptio* has nothing to do with the use of the words for a 'dilatory plea', e.g. D. XLIV. 1. l 3; L. 16. l 55. *Temporalis habitatio*, 'a right of residence for a time', is an expression not found elsewhere. The ordinary phrase would be *habitatio ad tempus*.

There were two or rather four questions discussed relating to temporary restrictions on servitudes: whether they could be established *ad tempus* and *ex tempore*, i.e. to last till a fixed day, and to commence from a fixed day, not the present moment; and again whether with such restrictions they could be reserved as well as directly constituted. It was agreed that they could be bequeathed (*per uindicationem*) both *ad tempus* and *ex tempore*: further that *inter uiuos* they could be constituted *ad tempus*, and Paulus thought they could be reserved *ad tempus*, but that they could not be constituted, and he doubted whether they could be reserved *ex tempore*. Pomponius thought they could not be reserved *ad tempus* (Vat. Fr. 48—50). Sabinus held that in strict law none of these were possible, but that by agreement (*pactum*) they could practically be done. And this opinion reported by Papinian, is adopted in the Digest (VIII. 1. l 4. pr.), and becomes more important in consequence of Justinian's allowing agreement to be a legitimate and effectual way of establishing a servitude. See note on l 3 (p. 38). The precise mode of reconciling Pomponius' view as reported by Paulus in the Vat. Fr. with our own passage from Pomponius is not clear. Tribonian has probably altered our passage.

l 33. pr. When a man bequeaths the propriety and the usufruct he bequeaths the whole of the thing, and the heir has nothing in it. If the intended fructuary die before the inheritance is entered on, the bequest of the usufruct fails, and the legatee of the propriety becomes effectual owner. If the legatee of the usufruct had died after the legacy was vested, the case

would have been the same, except for the temporary separation of the usufruct. The testator's heir gets nothing in either case (apart of course from the question of the Falcidian law). A stronger case is put in D. VII. 6. l 4. There a man bequeaths an estate less the usufruct, and bequeaths the usufruct to another on condition. What becomes of the usufruct in the time before the condition takes effect? Is it with the heir or with the legatee of the estate? Julian decided that notwithstanding the words *detracto usufructu* the heir took nothing, the proprietor would have the usufruct till the condition existed. It must be remembered that if such words had not been used, the legatee of the estate would have been entitled to the usufruct jointly with the legatee of the usufruct (D. XXXIII. 2. l 19), which would have been contrary to the testator's intention.

§ 1. **non partis effectum optinere**] 'in some cases the usufruct, it is agreed, is not treated in law as a part (of the thing) is treated'. Bas. has οὐκ ἔοικεν ἡ χρῆσις τῷ μέρει τῆς δεσποτείας. Similarly Cyrillus. Mommsen suggests that we should read *non partis proprietatis;* and the inferior MSS. have, instead of *non partis*, either *proprietatis* or *non proprietatis*. I do not think any change is necessary, but take *partis* to be *partis rei*. A usufruct is not like a part, for a part follows in some cases the fate of the other part, whereas a usufruct is independent. The question is not here, how far the usufruct can be regarded as part of the ownership (see note on l 4. p. 42). In a practical sense it is so: the usufructuary actually enjoys many of the rights which the proprietor would otherwise enjoy, and in particular has the actual possession and produce of the thing. But he is not a part owner, nor is he owner of part of the thing. The owner's rights apply equally to all parts of the thing owned, and his title to one part is the same as his title to another part. A usufruct is not a whole in this sense; it is rather a series of acts of enjoyment and the loss of one such act does not necessarily preclude his title to after acts. *Ususfructus cottidie constituitur et legatur, non, ut proprietas, eo solo tempore quo uindicatur* (D. VII. 2. l 1. § 3).

Cases in which a usufruct 'has the effect of a part' occur, e.g. D. XXX. l 82. §§ 2, 3.

si fundi uel fructus portio petatur] The chief of the inferior MSS. given by Mommsen has *si fructus uel fundi portio petatur*, and others seem to have similar readings. Such a reading, comparing the *fructus* with a *portio fundi*, is naturally to be expected after the previous sentence, and might be suggested (without necessity) by the last words of this law; but the clause *et absolutione* &c. seems clearly suited to a *pars fructus* as well as a *pars fundi*. From the words *pars altera quae adcreuit* it would appear that the *portio* here is the whole of the thing at the time of the action, but a portion only of what it subsequently became.

absolutione secuta] 'if the verdict is against the claim'. *Absoluere* is the regular opposite of *condemnare*, and the two words were the standing conclusion of the formulae, e.g. *si paret rem A. Agerii esse, iudex N. Negi-*

dium condemna: si non paret, absolue; cf. Gai. IV. 39; 86; 114, &c. A similar expression to ours is in D. XLVI. 1. l 52. § 3 *Plures eiusdem pecuniae credendae mandatores, si unus iudicio eligatur, absolutione quoque secuta non liberantur, sed omnes liberantur pecunia soluta.*

adcreuit] Accrual ('growth on' to a thing) is much narrower than accession (on which see note on l 9. § 4. p. 71), and in general is applied to a different class of cases. When more than one person have rights to the whole of a thing, the concurrence limits the rights of each to a proportionate share only, but if some of the persons so entitled lose or do not claim their share, such share accrues to the others or other.

Thus (*a*) if one of several heirs die before the testator, or does not enter, or is made heir on a condition which does not take effect, his share accrues to the heir or heirs who do enter (cf. e.g. D. XXVIII. 5. l 50. § 3; XXIX. 2. l 31; l 53. § 1; l 67; XXXV. 1. l 26. § 1).

Similarly (*b*) *bonorum possessores;* cf. D. XXXVII. 1. l 3. § 2; l 4 *In bonorum possessione sciendum est ius esse adcrescendi: proinde si plures sint quibus bonorum possessio competit, quorum unus admisit bonorum possessionem, ceteri non admiserunt, ei qui admisit adcrescent etiam hae portiones quae ceteris competerent, si petissent bonorum possessionem* (cf. ib. 8. l 1. § 12).

(*c*) Legatees *per uindicationem;* Gai. II. 199 *Illud constat si duobus pluribusue per uindicationem eadem res legata sit siue coniunctim siue disiunctim, et omnes ueniant ad legatum, partes ad singulos pertinere et deficientis portionem collegatario adcrescere. Coniunctim autem ita legatur 'Titio et Seio hominem Stichum do lego'; disiunctim ita 'L. Titio hominem Stichum do lego, Seio eundem hominem do lego'.* On the other hand in a legacy *per damnationem*, if *disiunctim*, the heir had to give to one the slave or thing, and to the other the value; if *coniunctim*, each had a share only, but if one partner failed to take his share, it did not accrue to the other partner, but remained with the heir. In Justinian's time accrual depended not on the form of words but on the intention of the testator to give one thing among several persons, but so that, if the others make default, one or more of them, qualified and claiming it, should have the whole to himself or themselves (cf. D. XXX. l 33 &c.; XXXV. 1. l 26. § 1; l 30).

(*d*) Children, not sons, passed over in a will. If a son *in potestate* was passed over in silence, the will was invalid (Gai. II. 123); but if daughters or grandchildren were so passed over, the will was not invalidated, but *praeteritae istae personae scriptis heredibus in partem adcrescunt, si sui heredes sint, in uirilem, si extranei, in dimidiam*, i.e. if three sons were named heirs and a daughter passed over, the daughter becomes heir to a fourth; if three strangers were named, the daughter becomes heir to a half, (ib. 124).

(*e*) Partners, in certain cases. *Communem seruum unus ex dominis manumittendo partem suam amittit eaque adcrescit socio* (Ulp. I. § 18).

(*f*) Ground formed by the gradual deposit from a river accrues to the owner of the ground next to which it is deposited (see note on l 9. § 4

alluuio, p. 72), cf. D. XIX. 1. l 13. § 14 *Si Titius fundum...uendiderit et... decem iugera alluuione adcreuerint*, the purchaser has them. In this last case the word *adcrescere* is used literally, and the case has not the characteristics of the others. In principle it falls under the class of accessions rather than under that of accruals. It serves just below to point a contrast.

A usufruct is the subject of accrual in two cases (*g*) from the usufructuary to the proprietary and (*h*) from one usufructuary to another. It accrues to the proprietary when there is no usufructuary entitled, and then follows the ownership just as accretions from water follow the principal land. *Si nuda proprietas pignori data sit, usus fructus qui postea adcreuerit, pignori erit: eadem causa est alluuionis* (D. XIII. 7. l 18. § 1). It accrues to another usufructuary when the intention of the testator was not to give them definite shares or specific parts of the thing but to make them joint usufructuaries, each being entitled to the whole. Then the rights of each being only limited by the concurrent rights of the other, on the one dropping, the survivor, no longer impeded, can exercise his rights over the whole. Whether the usufruct be *legatus coniunctim* or *disiunctim* they must, in order to have the right of accrual, be entitled not to a part of the usufruct but to the whole. *Totiens ius adcrescendi est, quotiens in duobus qui (usumfructum) solidum habuerunt, concursu diuisus est* (Vat. Fr. 79; D. VII. 2. l 3. pr.).

It will have been seen that in the four first-mentioned cases the property is not vested before the accrual. When it is vested, the property held in common can be divided by a partition suit, and whether divided or not the shares pass to the respective heirs. The four latter cases are different both from the former and from one another. In the fifth case (*e*) the act of the manumitter is treated as an abandonment of his rights: in the sixth (*f*) nature makes the addition to the property irrespective of who may be the owner. In the last two cases the right of usufruct is concerned, and that is personal and never passes to the fructuary's heir.

in lite proprietatis] 'in a suit for the ownership', i.e. when, as said above, *portio fundi petitur*.

iudicatae rei exceptionem] (*a*) A defeated plaintiff cannot be allowed to bring his action over and over again; nor a defendant to bring an action on the same matter against the successful plaintiff. When an appeal is allowed, the judgment in the suit cannot be considered given until the appeal is finally settled. After that the matter is *res iudicata*. According to the law under the formulary system, in most actions the praetor allowed a defendant, in a suit on a matter which was already decided, to plead that it was *res iudicata*, and this plea, if established, was fatal to the plaintiff's proceeding. There was one class of actions in which the plaintiff was stopped sooner: he was not allowed a formula at all. This class of actions consisted of those which were tried before a single judge (not *recuperatores*) in the city of Rome between Roman citizens on a

claim of strict civil law arising out of an obligation (*si legitimo iudicio in personam actum sit ea formula quae iuris ciuilis habet intentionem* Gai. IV. 107). Such an obligation was held to be transformed by joinder of issue (*lite contestata*) into a submission to the issue, and by the judgment either to be extinguished altogether or to be transformed into a new obligation to satisfy the judgment (Gai. III. 180. 181). Hence a plaintiff cannot even theoretically (*ipso iure*) bring an action again on the matter. In all other cases he can theoretically, but not practically: the plea 'matter is decided' bars his chance of success. After this formulary system was abolished, and of course therefore in Justinian's time, the *exceptio* was used in all cases.

(*b*) What then was *res iudicata*? Julian gave the rule that this plea was a bar whenever the same question is brought again between the same parties, even though the kind of suit be different (*quotiens inter easdem personas eadem quaestio reuocatur uel alio genere iudicii* D. XLIV. 2. l 7. § 4). What is the same question is not always easy to determine. But a suit for a part was barred, if a suit for the whole had been decided, whether the part was real, or ideal, or whether it was a definite place, actually part of an estate which as a whole had been the subject of a suit decided. But the timber of a house or the trees or stones on an estate might be the subject of a suit to which a decision on the house or estate as a whole would not be a bar (ib. l 7. pr. § 2). Fruits, again, are distinct from the estate; they may have come into being since the decision and stand probably in a different position (l 7. § 3). A usufruct is distinct from the property, except when it belongs to the owner of the property; then it is merged; so that a suit for the usufruct as belonging to the property and brought by the owner is a different suit (because really a suit for a different ownership) from a previous suit brought by the same person while entitled to the usufruct but not owner of the property. The usufruct in the earlier suit was a usufruct attached to the person of one who was not proprietor, the latter is a suit for the establishment of the proprietor's full rights over the property against a person claiming a separate usufruct (l 21. § 3). Again, a person who has a part of a usufruct claims against his co-usufructuary the whole, and is defeated. The co-usufructuary dies or 'has his head broken'; the decision in the previous suit is no bar to the surviving usufructuary claiming this accruing share; *non portioni sed homini adcrescit* (l 14. § 1), i.e. it does not become his because it has been added in some way to the previous share, but is added to that share because it belongs to him equally with that. He had (it is assumed) originally the right to the whole, so far as no other person with equal rights thereby limited his actual enjoyment. This other person having dropped away, his right over the whole is unimpeded. The argument and language are the same as in our passage. The result of this was that the co-usufructuary retained his right to the accrual, even though he had lost by non-use his right of usufruct so far as his first share

was concerned (D. VII. 2. l 10. pr.; 4. l 14; l 25), his right to the other share having been retained through his co-usufructuary exercising his right. See also Arndts in Glück XLVIII. p. 134 sq.

uelut alluuio] On alluvion see note on l 9. § 4 (p. 72). The accrual of a part of a usufruct to one of two co-usufructuaries is not like alluvion: the accrual of the usufruct to the propriety is more like alluvion, and is so described in D. XIII. 7. l 18. § 1 quoted above (in last note).

l **34.** pr. With this compare D. VII. 4. l 2. pr. and § 3. There three cases are mentioned in which a usufruct is bequeathed to two persons in alternate years:

(*a*) *Duobus separatim alternis annis*, i.e. *Titio usumfructum alternis annis do lego, Maeuio eundem usumfructum alternis annis do lego*, in which case by the order of mention the testator is presumed to have settled which should begin. Then the usufruct is away from the propriety continuously, but alternates from one fructuary to the other, year and year about.

(*b*) *Duobus simul alternis annis*, i.e. *Titio et Maeuio simul alternis annis usumfructum do lego.* Then the usufruct is away only every other year, the two fructuaries having it one year, and the proprietor the next, and so on.

(*c*) *Duobus singulis alternis annis*, i.e. *Titio et Maeuio usumfructum singulis in alternis annis do lego*, 'to Titius and Maevius each I bequeath the usufruct, &c.' where (I suppose) the testator is presumed not to have settled the order of enjoyment by the order of mention. Then if they both claim the same year, they neutralize one another; as the testator by saying *each* shewed that they were not to take together: if this difficulty be got over (so I take *si ea*, i.e. *uoluntas testatoris, non refragabitur*), then they will be in the same position as if the usufruct had been left them *simul.* In either case the usufruct will be away from the propriety only in alternate years. But if they select different years then the case will be the same as (*a*). In none of these cases will the one co-fructuary acquire by the death of the other more than the sole enjoyment in alternate years.

potest dici priori Titio] i.e. the first named is to have first enjoyment. *Potest dici* is an expression implying considerable doubt. In D. XL. 5. l 24. § 17 the case is put of a person being asked in a will to set free some of his slaves, and a sum of money being left to compensate him, but not sufficient to pay for all. *Quis ergo statuet qui potius manumittitur? utrumne ipse legatarius eligat quos manumittat, an heres a quo legatum est? et fortassis quis recte dixerit ordinem scripturae sequendum: quod si ordo non pareat, aut sortiri eos oportebit ne aliquam ambitionis uel gratiae suspicionem praetor subeat, aut meritis cuiusque allegatis arbitrari eos oportet* (where the last words are difficult. Do they mean 'they must submit to arbitration'? or the praetor must decide them = must elect those to be freed? but cf. l 13. § 1. p. 98). So under the *lex Fufia Caninia*, if the slaves were named, so many in that order were set free as the law permitted: if they were not named, but the testator professed to free all and

the total number was in excess of what the law allowed, none became free (Gai. I. 46. and Epit. ad loc.). See also D. XXXI. l 77. § 32.

si duo eiusdem nominis] When a legacy or inheritance was left to a person by name and there are several of that name, they might adduce proof as to which was meant by the testator (D. XXXV. 1. l 33. § 1; XXVIII. 5. l 63. (62). But if it was still doubtful, the gift failed altogether (XXXIV. 4. l 3. § 7; 5. l 10. (11) pr.; l 27; XL. 4. l 31). The heir was however at liberty to pay the legacy to which he chose, and could then protect himself by taking an engagement from the favoured claimant to take the risk and cost of a suit from the disappointed one (D. XXXI. 8. l 3): see Arndts in Glück's *Pand.* XLVI. p. 448.

nisi consenserint] For other cases of consent to remove colliding claims Cujac. (*ad hanc legem* III. 1091) quotes D. VIII. 3. l 28; XXX. l 84. § 6; § 13; XXXVIII. 1. l 23. § 1. All these, like our passage, are from Julian. See also D. X. 2. l 25. § 17. For the use of the lot Bernstein (*Z. R. G.* XVII. 192) adduces D. V. 1. ll 13, 14; X. 2. l 5; Cod. VI. 43. l 3.

inuicem sibi impedimento erunt] 'they will stand in one another's way', i.e. the bequest will drop. The MSS. have *impedient*, but a dative with *impedire* is found nowhere, I believe, except in Varr. *L. L.* IX. § 20 *nouitati non impedit uetus consuetudo.* In the similar passage D. VII. 4. l 2. § 3 we have *si consentiant in eundem annum, impediuntur, quod non actum uidetur ut concurrerent;* and again *si concurrere uolent, aut impedient inuicem. Impedire* with accus. is common, see D. XXXVIII. 6. l 1. § 4; § 7. So also is *impedimento esse* with the dative, cf. Lat. Gr. II. p. xlvi. It is possible that the word used by Julian was *obstabunt* (cf. D. XXVIII. 5. l 44 Paul *inuicem enim eos sibi obstare*). The Greek commentators on this passage are lost.

eo anno quo frueretur] 'in the year in which he had the usufruct', i.e. in any of the alternate years.

interim] 'for the time', 'meantime'. The expression is framed in reference to the following supposition of his afterwards parting with the propriety.

legatum non habebit] 'he will not have the separate usufruct which was bequeathed to him'. It is merged in the propriety so long as he has the propriety and it is his turn for having the usufruct, but, on the year expiring, the usufruct, as it were, revives again in Maevius, and Titius for that year has only the bare propriety. It would however be more correct to say that such a bequest should be viewed as a series of bequests, each of which vests only at the commencement of the year, so that the merger affects the usufruct for that year or part of a year only, without being any bar to the existence of the usufruct in subsequent years. Cf. D. XXXIII. 2. l 13 *Cum usus fructus alternis annis legatur, non unum sed plura legata sunt;* VII. 3. pr.; 4. l 28; XXXVI. 2. l 12. § 1. Whether in subsequent years he will have the usufruct or the full right of ownership, depends on whether he has, by the time when his turn comes again, parted with the ownership or not (cf. D. XXXVI. 2. l 23).

quia] This by way of proof introduces another case, in which a merger is averted by the bare ownership being parted with before the usufruct becomes vested.

si sub condicione &c.] A legacy whether of a usufruct or anything else made on condition does not vest till the condition is realized (D. XXXVI. 2. l 5. § 2). When this occurs, then the capacity of the legatee to take comes in question and not till then (ib. l 5. § 7; l 14. § 3). Consequently the fact, that while the condition was still in suspense the legatee held for a time the bare ownership, does not affect the legacy. If he had continued to hold it, the usufruct would on the condition being fulfilled come to him indeed, but then be at once merged in the ownership, and thereby be extinguished absolutely, so that if in any way he lost the ownership he would not retain the usufruct. This is illustrated by D. VII. 4. l 17. There a man (Maevius) has the usufruct bequeathed to him absolutely, while the bare ownership is bequeathed to Titius on condition. Maevius acquires the ownership (subject of course necessarily to the condition) from the heir and by this act merges the usufruct in it. The condition is fulfilled. Titius becomes proprietor, and, as the usufruct no longer exists separately, becomes proprietor with full rights. Similarly D. XL. 4. l 6. The owner of a slave makes his will, appointing the man who has the usufruct of the slave his heir, but giving freedom to the slave on a certain condition. The fructuary becomes heir: his usufruct is therefore merged in the ownership: the condition takes effect, and the slave thereby gains his freedom at once. So D. XXXI. l 76. § 2. Again VII. 4. l 27. A slave commits some offence against the man, in whose usufruct he is, which gives the fructuary a claim against the owner. The owner surrenders him *noxae* to the fructuary. The usufruct is merged, and henceforth gone. Consequently (if Inst. IV. 8. § 3 apply, see p. 136 *o*) the slave by working off the amount of the damage becomes free. Whether *liberabitur* in this l 27 be taken of the slave being no longer subject to the fructuary *qua* fructuary, as Bas. (*φθείρεται ἡ χρῆσις*) and Pothier take it (and this seems best), or of the usufructuary being freed from all obligation to the (former) owner, as Glück (IX. p. 355 n. 82) and the German translators take it, or of the eventual freedom of the slave (on which see note on l 17. § 2 *noxae* § *o*. p. 136), does not make any difference for our point. Of course merger affects only the particular usufruct or servitude in question: any owner in full rights can create such a usufruct or servitude afresh. For cases in which merger is revoked see below l 57.

ad legatum admittar] 'I shall when the condition is fulfilled be admitted to the usufruct', and consequently have to give the usual usufructuary's stipulation. *Admittere* is frequent in such cases where the interposition of the praetor is usual, e.g. D. XXXV. 1. l 26. pr. *quamuis uerbis edicti ad hereditatem uel legatum admittatur;* V. 2. l 6. § 1 *si quis ex his personis quae ad successionem ab intestato non admittuntur;* XXXVII. 6. l 1. § 8; XXXIX. 2. l 13. § 3.

§ 1. **colono**] 'agricultural tenant'. Cf. D. XIX. 2, especially l 15. The tenant of a house or rooms was called *inquilinus*, cf. ib. l 24. § 2; l 25. § 1; XLI. 2. l 37. See above p. 143 *insulam*.

aget ex conducto] The usufruct having been bequeathed to him, he claims it as his own (Gai. II. 194). But on his lease the testator was bound to grant him the enjoyment of the land (*ut frui liceat*), and the heir is during the continuance of the lease bound to fulfil the testator's covenants. As the heir cannot fulfil the covenant literally by granting him the enjoyment which is already by the testator's will his own, the heir is bound by the lease to give the equivalent, i.e. release him from the rent and reimburse him for his expenditure. And this is enforceable by an action *ex conducto* (D. XIX. 2. l 15. § 1; l 9. § 6). In our place the legacy was clearly given *per uindicationem:* in D. XIX. 2. l 24. § 5 we have a similar case, but the legacy is *per damnationem*. *Qui in plures annos fundum locauerat testamento suo damnauit heredem ut conductorem liberaret. Si non patiatur heres eum reliquo tempore frui, est ex conducto actio: quod si patiatur nec mercedes remittat, ex testamento tenetur.* There the usufruct did not by the will become the property of the tenant; it still remained with the heir; and the heir therefore was still able to perform the covenants of the lease and let the tenant enjoy. If he did this, the tenant had no right on the lease to demand remission of the rent. For this he must sue on the will, which bound the heir to release him from the rent.

impensas quas in culturam fecerat recipiat] What expenses the tenant is in this circumstance authorised to recover is not free from doubt. If the lessor is chargeable with the breach of contract, the tenant ought to receive *id quod interest* (D. XIX. 2. l 15. § 8); if the fulfilment of the contract is impossible owing to something which the lessor could not hinder, remission of the rent is all that can be required (ib. l 33. fin.). But the case which we are dealing with is one in which the lessor is indeed the cause of the non-fulfilment of the contract, but only because he thereby intends to benefit and does benefit the lessee. The reasonable thing is to treat the tenant as he would be treated if the lease had expired in the natural course of events, i.e. to reimburse him for any ordinary expenditure (e.g. seed and manure) which the remission of the rent has not covered, and also for any special expenditure which, either by the terms of his lease (cf. l 24. § 3) or by the obligations of the situation, he may have been induced to make, and which would have been recoverable by a tenant according to the general law. For necessary or useful expenditure, although not covenanted, entitles the tenant to reimbursement according to ib. l 55. § 1; l 61. pr. In fact the tenant, on the legacy taking effect, gives up his holding as a tenant and is entitled to the usual reimbursement: and then starts afresh on the farm, as his own for his life or till forfeiture, in the condition in which the farm then is, whether improved or not by his previous occupation as lessee.

§ 2. **uniuersorum bonorum**] 'of the whole of his estate'. See above on l 29 *omnium bonorum* p. 187.

hactenus interesse] 'there is this much difference'; usually followed by *quatenus*, here by *quod*, cf. l 9. § 7.

si aedes incensae, &c.] See D. VII. 4. l 5. § 2, which is express on the point and refers to Julian. See also above l 36.

usus fructus specialiter aedium legatus] 'the usufruct of a house as such', not the usufruct of a plot of land with a mass of bricks and mortar.

eorum quae in specie sunt] 'of those things which are in specific form', i.e. a house, a cup, a garden; not existing as a rude mass, as mere bricks and timbers, or mere land, or a lump of silver, &c. Compare the use of *species* in D. XLI. 1. l 7. § 7. This is the meaning also in the passages where *species* is opposed to *genus*, e.g. in D. XII. 1. l 2. pr. *mutuum damus, recepturi non eandem speciem quam dedimus (alioquin commodatum erit aut depositum) sed idem genus; nam si aliud genus, ueluti ut pro tritico uinum recipiamus, non erit mutuum. Substantia*, 'substance', to which it is here opposed, is still more general than *genus* ('kind of substance'). For *substantia* cf. Gai. II. 79 *quidam materiam et substantiam spectandam esse putant.* Dirksen s. v. takes it here in the sense of a man's total property. But that is represented here by *uniuersorum bonorum*, and *substantia* means the underlying stuff.

l 35. pr. **hoc quoque praestabitur**] 'this also will be made good', i.e. the heir will have to make good to the usufructuary the loss sustained by the delay. Cf. below, l 36. § 2.

§ 1. The testator bequeaths to me the usufruct of a slave, and at the expiration of my usufruct (either by death, *capitis deminutio* or non-user) gives the slave his freedom. Instead however of my actually having the slave's services, I receive from the heir the money value. Is the slave thereby at once entitled to his liberty? No. My user may be said to continue in the form of enjoyment of the money equivalent (cf. l 12. § 2). And therefore the slave's freedom is neither accelerated nor defeated, but remains in abeyance until I die or suffer *cap. dem.* &c.

aestimationem legati] In some cases, as for instance when the specific thing bequeathed belongs to another and cannot be obtained from him or when a slave has run away, the heir *can* only pay the value instead of handing over the thing or slave. So if the same thing was left *per damnationem* to two persons separately, the heir could only give the thing to one, and pay the value to the other. Moreover as the condemnation in the formula always was expressed in money, it is possible that the heir could, if he chose not to give up the thing or slave, retain it and pay the value, such value however being liable in that case to be fixed at an extravagant amount (Gai. IV. 48 sqq.; cf. D. XLIII. 29. l 3. § 13). D. VI. 1. l 68, which

directs the judge to restore the thing by main force, is generally considered to have had this interpolated by Tribonian. See Savigny *System.* v. p. 123; Bethm.-Hollweg II. 226; 698; Wächter *Pand.* I. p. 563; *contra* Rudorff II. § 92. p. 307.

nihilo magis] It seems to have been thought that as the intended fructuary did not, and could not, actually *uti frui*, this was equivalent to his having ceased *uti frui*. To which Julian answers that the assumption is incorrect: the legatee did *uti frui*, but in another form, cf. l 39.

interuentu] 'on the occurrence' which as it were *interferes* with the continuance of the previous state of things. In other places *interuentus* has more force than appears here. Cf. D. IV. 6. l 26. § 7; XL. 11. l 2; &c.

l **36**. pr. The difference between the two cases mentioned here is this. An area is simply an unoccupied piece of ground, and is not altered by a building having been erected on it, if the building is no longer there, when the legacy vests. But the usufruct of a building is not the usufruct of any and every building, but of a specific building, and on the destruction of that specific building the legacy becomes void. An area occupied by a building is an area no longer, and a building destroyed is of course a building no longer, and therefore the usufruct in both of them is impossible (cf. D. XXX. l 47. § 4; § 6; &c.). In D. VII. 4. l 5. § 2; § 3; l 10. § 1 we have the same rule applied to the continuance of a duly-constituted usufruct, which is here applied to the existence of it at all. The rule is different as regards a legacy of the things themselves, and not merely of the usufruct of them. The bequest of an area carries with it any buildings erected on it (D. XXXI. l 39); the bequest of a building however is not valid, if the whole building be new since the will was made, and not merely repaired gradually but completely (D. XXX. l 65. § 2).

existimauit] viz. the lawyer consulted on the question, whether Africanus himself or not. Mommsen, *Z. R. G.* IX. p. 90, is inclined to think that Africanus reported the opinions of Julian, and hence usually we have the third person, not the first. But the first and third persons are both found in other writers, perhaps, as Mommsen suggests, from misinterpreting an abbreviation.

non idem iuris esse] 'the same rule is not law'. Cf. *quaestionis est* l 25. § 3, and note p. 168; *quid iuris sit* (l 37; XX. 5. l 7. § 2); *id iuris est* (XIII. 7. l 5); *idem iuris est* (XLV. 1. l 85. § 4); &c.

si insulae, &c.] 'if when the usufruct of a block of buildings had been bequeathed, it had been made into a vacant plot, and then into a block of buildings again'.

scyphorum] A scyphus was a large bowl or cup, said to have been originally a shepherd's wooden bowl or pail, and afterwards made in pottery or silver (Athenae. XI. pp. 498—500). It is what Hercules is

often represented as holding: *Scyphus Herculis poculum est* (Macrob. v. 21. § 16 commenting on Verg. *Aen.* VIII. 278). *Faginus astabat scyphus* (Tibull. I. 10. 8); *scyphum euersum* (Suet. *Claud.* 32), cf. Trebell. *Claud.* 17; Becker's *Gallus*, ed. Göll. III. p. 407.

deinde massa facta, &c.] 'if they had then been reduced to a mere mass of metal; and then again made into bowls'.

pristina qualitas scyphorum] 'the former character of bowls'. *Scyphorum* is probably a genitive of definition (*Gr.* §. 1302).

non tamen illos esse] 'still (he considered) they were not *the* bowls, the usufruct of which had been bequeathed'.

§ 1. A verbal contract is made for an estate, the promiser reserving the usufruct. What is the import of this reservation? Is it simply for the benefit of the promiser, and consequently on his death does it fall to the propriety? or has the promiser a power of appointment to be exercised in favour of anyone whatever that he chooses? The usual case was to reserve simply for oneself, but if the reservation was in gross, there is nothing to restrict it to the promiser, and the event only can shew decisively; cf. l 54. So with the reservation of an urban servitude: if the seller of a house declares in the sale *seruas fore aedes, uel suis aedibus eas seruas facere potest uel uicino concedere seruitutem* (D. VIII. 4. l 6. § 3*a*). So much for the contract. But when effect comes to be given to the contract by the conveyance, the reservation or declaration of servitude must be express: the house or person, in whose favour the servitude is constituted or reserved, must be stated (ib.). In our text the promiser dies before conveyance. If the reservation was simply for himself, the usufruct reverts on his death to the propriety, and the person who had duly contracted for the propriety is entitled to demand from the promiser's heir conveyance of the whole estate without deduction of the usufruct: if it was a reservation in gross, then he can only demand conveyance of the propriety.

de Titio] So in l 37; D. XLV. 1. l 22. *Ab* is much more common; cf. l 7. § 2. p. 65.

detracto usu fructu] Cf. D. XLV. 1. l 56. § 7; l 126. § 1 and note on l 32 *excipere* p. 195.

decessit] 'died'. So frequently, e.g. D. IX. 1. l 1. § 13; XXI. 1. l 31. § 11.

respondit] i.e. the lawyer consulted, whoever he was, gave the answer.

referre qua mente, &c.] 'that it depends on the intention'. Cf. D. L. 17. l 34 *Semper in stipulationibus et in ceteris contractibus id sequimur quod actum est*, i.e. what was the obligation actually entered into; XLV. 1. l 21. pr. *Facti quaestio inducitur quid senserit, hoc est quid inter eos acti sit: utique enim hoc sequimur quod actum est.* See an interesting case analogous to our text in D. XXXIII. 2. l 26.

exceptus] e.g. *detractus*. See note on l 32.

promissori dumtaxat] 'for the promiser and him only'. *Dumtaxat*

is used frequently both in ordinary and law language, as well before as after the word on which emphasis is to be laid: e.g. before the word, Gai. I. 152, 153: D. III. 5. l 41 (42); after, Ulp. XI. 13; D. VI. 2. l 7. § 7; VII. 6. l 3; XXXIII. 2. l 6.

reciperetur] 'be reserved'. Just above *detrahere* and *excipere* are used in this same meaning. *Recipere* is frequently used of reserving servitudes, e.g. Cato *R. R.* 149; Cic. *Or.* I. 39. § 179 (on which see Wilkins' note): D. VIII. 4. l 5; l 6. fin.; l 10; XVIII. 1. l 40. § 4; XIX. 1. l 53. § 2; XXI. 2. l 69. § 5; XXXIX. 6. l 42. pr. Also of reserving a right to vegetables, Cato l. c.; *pomum recipere* (D. L. 16. l 205); of *ruta caesa* Cic. *Or.* II. 55. § 226; *Top.* sub fin.; of corn crops, D. XVIII. 1. l 40. § 3; of a part of a house, Plaut. *Trin.* 157; of money, in making a dowry, Cato *ap. Gell.* XVII. 6. § 1; of a gift *mortis causa*, D. XXXIX. 6. l 35. § 2. *Seruus recepticius* (in Cato *ap. Gell.* l. c.) is explained by Gellius to mean a slave belonging to the part of a wife's property *reserved* from dowry. (*Dos recepticia* is a dowry given by a stranger, who stipulates for its being repaid on the death of the wife, Ulp. VI. § 5; D. XXXIX. 6. l 31. § 2. Probably the name is derived from *recipere*, 'to receive back'. In Gai. I. 140 *mancipio recipit* is 'receives back by mancipation'.)

plenam proprietatem] 'the propriety with full rights', i.e. without reservation of the usufruct, below, l 46; opposed to *nuda proprietas*, D. VII. 4. l 2. pr. So *plenus usus*, 8. l 12. pr.; *nudus*, ib. l 1; *plenus fundus*, D. XXXIII. 2. l 6; *fundus pleno iure rediit*, D. XXXIII. 1. l 19. pr.

manifestius] 'more clearly', because anything not specifically bequeathed remains to the heir as his own; and a usufruct reserved in a legacy would then not revert to the propriety till the heir's death.

heres a quo] 'the heir from whom', i.e. the particular heir charged with the legacy. See note on l 2. § 2 *ab ea re relicta*, p. 65.

principium ex test. ageretur] i.e. before the usufruct was legally demanded by the legatee from the heir. He could not demand it till the heir entered on the inheritance (D. VII. 3. § 4).

minus dubitandum] The doubt which some felt was of course caused by the result in the circumstances being in each case (verbal contract, legacy immediate, legacy conditional) contrary to the express words creating the right. The person who is entitled to claim the propriety without the usufruct will receive the propriety along with the usufruct. Why there was less (*minus*) room for doubt here is explained just above under *manifestius*.

heres eius] i.e. the heir of the heir charged with the legacy.

idemque et si, &c.] 'and the same holds good also, if', &c.

§ 2. Delay on the part of the heir charged with the usufruct of a slave entitles the legatee to get whatever may be the value to him of the due performance on the part of the heir. If during the delay circumstances occur which make it impossible for the heir to establish the usufruct, the heir is not thereby exempted from compensating the legatee.

See l 47: cf. D. XXXIII. 2. l 6, where the case is put of a legacy of a usufruct for two years only, and the heir delays till the two years have expired. The usufruct bequeathed cannot now be sued for; any usufruct for another two years would be another usufruct and not that bequeathed. But the heir is liable for the value. In our text two cases are taken, first the death of the slave, i.e. the destruction of the object of usufruct; secondly the death of the intended fructuary.

cum per heredem staret quo minus, &c.] The subjunctive (*staret*) is here used to denote what I have called (Lat. Gr. § 1720) 'an essential part of the history', not a cause. 'The heir being in default for not giving effect to the bequest'. *Per aliquem stare* (*fieri, fore*) *quominus* is the regular phrase for making default in the performance of a duty, cf. l 37; D. II. 8. l 8. § 4; XIII. 5. l 16. §§ 2, 3; l 18. pr.; XIX. 1. l 21. § 3, &c. See note on l 19. pr. p. 145. It is not necessary that the heir or promiser, &c., should by act or neglect hinder his due performance: default does not imply positive fault: non-performance of the obligation puts the person obliged in default, unless he can shew some unexpected objective hindrance. Not having the money is no valid excuse for not paying what one has promised or is otherwise bound to pay. It is an *incommodum personae*, not an *impedimentum naturale* (D. XLV. 1. l 137. § 4).

aliud dici, &c.] 'he says there is no room for any other opinion than that the heir is bound so far as this, viz. in the amount of interest which the legatee had in the absence of delay'. Cf. D. XXX. l 39. § 1 *Ipsius quoque rei interitum post moram debet, sicut in stipulatione, si post moram res interierit, aestimatio eius praestatur;* XLV. 1. l 82. § 1; XII. 2. l 30. § 1.

quanti leg. intersit] Cf. l 47. The measure of damage is not simply the market value of the slave's services for the time, but the loss of the legatee from not having him. And this might be considerably more, as there is the possibility of the fructuary obtaining legacies or inheritances through him (l 22). Cf. D. IX. 2. l 21. § 2; l 22.

moram] *Mora* is used both in the ordinary sense of delay in general, and in the technical sense of delay for which one is answerable, i.e. default. They both occur in D. XXII. 1. l 24 *Si quis solutioni quidem moram fecit, iudicium autem accipere paratus fuit, non uidetur fecisse moram. Mora* is not default unless the due day has arrived (*dies uenit*); nor usually, in the absence of special stipulation, unless the creditor has applied for payment; (on this disputed point see Vangerow *Pand.* III. p. 186; Wächter *Pand.* § 192, II. p. 397). Cf. ib. l 32 *mora fieri intellegitur non ex re sed ex persona, id est si interpellatus oportuno loco non soluerit; quod apud iudicem examinabitur...cum sit magis facti quam iuris.* Excuses are sometimes admissible (ib. l 21—l 23; XLV. 1. l 91).

ex eo tempore] i.e. the time when delay first occurred (cf. just below *ex eo tempore quo mora sit facta*), i.e. the time when the conveyance of the usufruct was due and was not made.

usus fructus aestimetur] In valuing the produce, not only what the

heir has actually taken, but what the legatee might have taken, is to be regarded (D. XXX. l 39. § 1). The produce taken before the due day of a usufruct belonged to the heir, cf. above l 27. pr.

in diem mortis] 'to the day of Titius' death'. As the usufruct, if established, would yet have been extinguished by the death of the fructuary, the intended fructuary's heir cannot claim anything beyond that.

l 37. The last section treated of delay in the case of a bequest: this law treats of delay in the fulfilment of a stipulation. Otherwise the two cases put here are something similar to that quoted above from D. XXXIII. 2. l 6. A stipulation for a usufruct or for a slave's services for the next ten years is not a stipulation simply for ten years of a usufruct or of a slave's services, so that it can be fulfilled at any time. Both in form and substance a postponed ten years is very different, and probably much less useful to the stipulator than the ten years next after the stipulation was made. If five years elapse, the ten years stipulated for cannot be given. Still, if the promiser is in fault, he must make amends, and the stipulator can still sue on the stipulation for the fulfilment—if not *in specie* then in the money value. Impossibility of fulfilment is no good plea, when the promiser is in fault (cf. D. XLV. 1. l 82. § 1; l 91. § 3; l 114, &c.), and above, note to *aliud dici*, p. 209. The question whether and how far in an action on a stipulation of a thing the *fructus* can also be claimed (D. XXII. 1. l 38. § 7), is quite different to the question of our passage, where the usufruct itself was stipulated for.

de te] belongs to *stipulatus*. See l 36. § 1.

Stichi operas] Either by legacy or stipulation a man might acquire a right to the services of another man's slave. In what respects did this differ from the usufruct of a slave? This question is answered in the Digest respecting the legacy of such services. The right was not lost by non-use, nor by *capitis deminutio*, nor by the death of the legatee, but only by the death of the slave. The legatee was entitled to hire him out, or the slave might hire himself out: in either case the legatee was entitled to the wages (D. XXXIII. 2. l 2). The right does not vest like a usufruct on the heir's entrance on the inheritance, but on the day (being that or a subsequent day) on which the services are demanded (D. VII. 7. l 2; XXXIII. 2. l 2; l 7). The same answer would apply to *stipulated* services, except so far as the intention of the parties might be otherwise. The *operae* spoken of in the Digest are frequently *operae liberti* (e.g. D. XXXVIII. 1; XLV. 1. l 54. § 1; l 73. pr.). See note on l 12. § 3, p. 88.

quod per te—darentur] 'which has been allowed by you to go by without the usufruct being conveyed'. The expression is strange: *quominus darentur* ought to depend on a statement of the hindrance, not of the time which has elapsed during the hindrance. Either *quia per te factum est quominus darentur* or *per quod cessabat stipulatio* would have been better expressions. The text seems a bold compression of both meanings.

l 38. The subject of this law occurs before in l 12. § 2. See the notes there. Our text states what is non-use: that stated what is use.

uideor us. fr. retinere] 'it is held that I retain the usufruct; because I am using the price, which, as it were, represents the usufruct', not because the purchaser is my deputy for using it. See l 39; l 35. § 1.

l 39. **non minus habere**] 'not less to have the thing'. *Minus* is adverbial.

Habere is a very general word. D. XLV. 1. l 38. § 9 *Habere dupliciter accipitur: nam et eum habere dicimus, qui rei dominus est et eum qui dominus quidem non est, sed tenet: denique habere rem apud nos depositam solemus dicere.* It is applicable to usufructs, ib. § 3, where after discussing the covenant for quiet enjoyment (*habere licere*) usually entered into by the seller to the purchaser, Ulpian proceeds *Si quis forte non de proprietate sed de possessione nuda controuersiam fecerit uel de usu fructu uel de usu uel de quo alio iure eius quod distractum est, palam est committi stipulationem* (i. e. it is plain a breach of the covenant is in issue): *habere enim non licet ei, cui aliquid minuitur ex iure quod habuit.*

It is only as respects the question of forfeiture for non-use that the enjoyment of the price is equivalent to enjoyment of the usufruct itself.

l 40. In the case of gift the fructuary retains nothing, so that the only possible use is the vicarious use by the donee.

l 41. Two cases are here named where a usufruct may be established, though it is at first sight not easy to see where the *fructus* is. The first case is that of a statue or bust; the second that of a landed estate which costs more in keeping up than its produce is worth. The use of the word *utilitas* suggests that some may have doubted not only whether a statue was capable of *fructus*, but even of *usus*, cf. l 28.

statuae et imaginis] The singular is used as more general than the plural. These two things are often mentioned together, e.g. Plin. *H. N.* XXXIV. 15 *Transiit deinde ars uulgo ubique ad effigies deorum.....Transit et a diis ad hominum statuas atque imagines multis modis;* D. XXII. 1. l 17. § 8; XLIII. 9. l 2 *Concedi solet ut imagines et statuae, quae ornamento reipublicae sunt futurae, in publicum ponantur;* L. 10. l 5. pr.; l 6 *Qui statuas aut imagines imperatoris iam consecratas conflauerint.....lege Iulia maiestatis tenentur.* The *statua* was a full-length statue. *Imago* was a portrait or likeness, and might be painted or modelled (Cic. *Fam.* v. 12. § 7) or cast in plaster or wax (Plin. *H. N.* XXXV. 153). The 'likenesses' meant here were probably the bronze or silver busts, which were often placed in libraries and elsewhere to adorn houses or public buildings, and are distinguished from the medallions, i.e. shields exhibiting likenesses in relief. Cf. Suet. *Dom.* 23 *Scalas etiam inferri, clipeosque et imagines eius (Domitiani) coram detrahi et ibidem solo affligi (senatus) iubet.* It is however possible that among 'likenesses' may be included the wax masks

(often called *imagines* and probably the earliest form of likeness) which were made to represent a man's ancestors and (fastened probably upon busts, &c.) placed in cabinets (*armaria*) in the side wings of the inner hall (*atrium*). See Plin. XXXV. 4—14; Vitruv. VI. 3. § 6; Sen. *Ben.* III. 28; Marquardt, *Priv. Alt.* p. 235 sqq.

posse relinqui magis est] 'The better opinion is that such a legacy is good'. *Magis est,* 'it is more the fact', is found in Cic. *Cael.* 6. § 14 *In magnis cateruis (Catilinae) amicorum si fuit etiam Caelius, magis est ut ipse molesta ferat errasse se.....quam ut istius amicitiae crimen reformidet; Att.* XVI. 5. § 2 *Quamobrem etsi magis est quod gratuler tibi quam quod te rogem, tamen etiam rogo;* and frequently in the jurists; e.g. generally with *ut* Paul. *Sent.* III. 1 *Si fratri puberi controuersia fiat, an pro parte impuberis differri causa debeat uariatum est: sed magis est ut differri non debeat;* Vat. Fr. 206; D. I. 9. l 7. § 2; XXVI. 2. l 16 ter; XXVII. 9. l 5. § 15, &c.; with *ne,* D. XVIII. 4. l 2. § 2; XXVII. 9. l 5. § 14; XXXIX. 1. l 1. § 13 *Si quis aedificium uetus fulciat, an opus nouum nuntiare ei possumus uideamus, et magis est ne possimus;* but also with infin. clause (as here) D. XLVI. 3. l 72. § 4 *Et magis est deficere stipulationem;* IX. 2. l 32. pr.; XXXVII. 4. l 1. § 7; XLVII. 2. l 3. § 2; l 44; and absolutely D. XXI. 1. l 15 fin. *sed illud magis est quod diximus;* XIII. 7. l 1 *quod magis est;* XX. 6. 18. § 17; XL. 4. l 13. pr.

§ 1. **ut magis,** &c.] 'that we rather spend on them than acquire from them'; not 'spend more', which would be *plus imp.*

l **42.** pr. The use contains some part of the produce, e.g. vegetables and flowers for daily use, but not to sell; oxen for ploughing; cattle for manure, but not lambs, or milk, or wool (D. VII. 8. l 12). The *fructus* will in this case, if bequeathed separately, not carry with it all the produce, but so much as is left after the legitimate requirements of the user are satisfied. But the fructuary will also have a right of using: for the produce and the usufruct are the same: and thus if the produce be left with an express deduction of the use, the legacy is useless: if the produce be left without specifying the use, the use is included (D. VII. 8. l 14. § 1). *Si quis fructum, deinde usum stipulatus fuerit, nihil agit* (XLV. 1. l 58), because with the *fructus* he has already got the *usus.* Paul. *Sent.* III. 6. § 24.

§ 1. **rerum an aestimationis,** &c.] The difference between the two lies herein. If the usufruct of the goods of a man after his death is bequeathed to one who has also a legacy of a specific portion of them, the legatee actually gets the property (inclusive of the usufruct) in that portion, and the usufruct only in the rest. But if to the same man besides the specific legacy is left also the usufruct in the value of the goods of the testator, he gets the specific legacy and the usufruct in the value of the whole. In this latter case there is nothing to prevent the usufruct being held to extend over the whole value: in the former he gets the property in part and cannot have a usufruct in his own pro-

perty, but only in the rest of the testator's goods. If a legacy of part of the testator's goods were made, the heir could choose whether to divide the goods or give a share of the value (D. XXX. l 26. § 2).

saepius idem legando] 'by bequeathing the same thing more than once', i.e. to the same person (cf. D. XXX. 34. § 1). If the same thing is left first to one person and then to another (*disiunctim*), the ordinary interpretation would be that each was to have an equal share; but it might be, if the testator clearly so intended, that the first legacy was revoked by the second, or, if the testator clearly so expressed it, that each was to have the whole, i.e. one get the thing and the other its value (ib. l 33). Under the law before Justinian something depended on the form of the legacy, whether *per uindicationem* or *per damnationem* (Gai. II. 199, 205).

l 43. **dimidia pars...continetur**] The reason for this rule is probably that a half is the only part which has on each side of it, i.e. in excess and defect, an equal quantity, and therefore a balance of probabilities. Cf. D. XXX. l 19. § 2 *In legato pluribus relicto, si partes adiectae non sunt, aequae seruantur;* XVII. 2. l 29. pr.; L. 16. l 164. § 1.

l 44. The usufructuary may not of his own right put new plaster on rough walls. Plaster was regarded as an ornamental, not a necessary, addition, and consequently money borrowed by a slave and expended without his master's orders on new plastering was not chargeable against his master as having been converted to his master's use (*in rem uersum* D. XV. 3. l 3. § 4). He may however repair such an ornamental plaster, if he finds it, and may colour it or paint and otherwise adorn it (above, l 7. § 3; l 13. § 7), but the character of the house or rooms is not to be changed.

qui rudes fuissent] 'which had been left rough'; not plastered smooth and polished for paintings. The pluperfect is frequent after a present in the Digest; so *accepisset* just below.

tametsi—esset] 'even though he would have made the position of the owner better by improving the building'. See above, l 13. § 7. For *causa* see note on l 13. § 4, p. 105.

tueri] 'maintain'. Cf. D. XXV. 1. l 15 *Tueri res dotales uir suo sumptu debet.* Just before, *tutela* is used of the same. Cf. Cic. *Off.* II. 23. § 83 *Cum ego emerim aedificarim tuear impendam, tu me inuito fruare meo?*

ac nouum facere] Flor. has *an nouum faceret.* The inferior MSS. generally have *aliud nouum facere*, which Mommsen recommends. This mode of expression makes good sense, and is found elsewhere in the Digest (e.g. D. XXIII. 3. l 20), but the substitution of *ac* for *an* is simpler, and *ac* is more likely to have been altered by copyists either to *an* or *aliud*, and makes equally good sense. *Alius...ac* is common in ordinary writers. (Does it occur in the Digest?) Bas. has φυλάττειν γὰρ ὀφείλει ὅπερ εὗρεν, οὐ μὴν καινοποιεῖν, which is not decisive as to the words of the

Latin. The Florentine reading is impossible: *faceret* is no doubt due to *an:* but *an* is wrong altogether.

l 45. The usufructuary of a slave is bound to defray the cost of his food as well as of anything made requisite by illness.

cibariorum] *Cibaria* are often mentioned in legacies, e.g. D. XXXIV. 1. l 21 *Diariis* (daily rations) *uel cibariis relictis neque habitationem neque uestiarium neque calciarium deberi palam est, quoniam de cibo tantum testator sensit.* See above, l 7. § 2 *alimenta*, p. 63. *Cibaria* is also used of food for cattle, D. IX. 2. l 29. § 7; Cato, *R. R.* 60.

ualetudinis impendia] Expenses occasioned by the illness of a slave, e.g. medical treatment, if moderate, could not be recovered, any more than the cost of food, by a borrower (D. XIII. 6. l 18. § 2 *Possunt iustae causae interuenire ex quibus cum eo qui commodasset agi deberet, ueluti de impensis in ualetudinem serui factis:.....nam cibariorum impensae naturali scilicet ratione ad eum pertinent qui utendum accepisset. Sed et id, quod de impensis ualetudinis.....diximus, ad maiores impensas pertinere debet: modica enim impendia uerius est ut, sicuti cibariorum, ad eundem pertineant*), nor by the husband in respect of a dowry slave, D. XXV. 1. l 12 *Omnino et in aedificandis aedibus et in reponendis propagandisque uineis et in ualetudine mancipiorum modicas impensas non debet arbiter curare: alioquin negotiorum gestorum potius quam de dote iudicium uidebitur;* ib. l. 2.

ad eum respicere] 'to look back to him', i.e. 'regard him'. Cf. D. XVIII. 1. l 34. § 6; 4. l 2. § 9 *Sicuti lucrum omne ad emptorem hereditatis respicit, ita damnum quoque debet ad eundem respicere;* XV. 1. l 19. § 1; XXXVII. 5. l 3. § 4; &c. So Caes. *Bell. Civ.* III. 5 *ad M. Bibulum summa imperii respiciebat.*

natura manifestum est] 'is clear without proof'. Cf. D. XLIV. 7. l. § 12 *Furiosum siue stipulatur siue promittat nihil agere natura manifestum est;* ib. § 14; XLV. 1. l 75. § 4.

l 46. pr.] A son in the power of his father at the time of the father's making a will must either be named as heir or expressly disinherited. If he be passed over, the will is void *ab initio* (Gai. II. 123; D. XXVIII. 2. l 7) and the son succeeds to the inheritance as if no will were made. An emancipated child or children, if passed over, could by the praetor's edict claim, the father's will notwithstanding, possession of the goods, i.e. of the inheritance, of his deceased father. An adopted son who had not been emancipated, and a natural son who had been adopted by another but had been emancipated by his adoptive father, had this right as much as a natural son who had never been adopted (D. XXXVII. 4. l 1. pr.; l 6. § 4). A son made heir by his father had not this right, unless another son who had been passed over exercised it, in which case the instituted son was allowed to claim it for himself. If instituted heir only to a small share of his father's property, he might gain by thus setting the will entirely aside and coming on equal shares with

his brothers into the possession (D. XXXVII. 4. l 3. § 11; l 8. § 14). What has been said of sons is true also of daughters and of all descendants, who in the order of intestate succession would have been *sui heredes* if not emancipated (D. XXXVII. 4. l 1. § 1). Emancipated children were thus put on the same footing as regards their father's will with children *in sua potestate.* But the praetor in thus recognizing natural claims which the testator had ignored, guarded against thereby doing violence to other natural claims which the testator had recognized. If the will was thus upset, the legacies would fall with it. So the praetor protected legacies in favour of children and their descendants and of parents, and legacies on account of dowry to a wife or daughter-in-law (D. XXXVII. 5. l 1). A person claiming the possession against the will could not take a legacy as well (l 5. § 7). And further, any child so claiming the possession had to share with such children of the same grade as were instituted heirs any property which he himself had (D. XXXVII. 6. l 1. pr.; ib. § 24; Collat. XVI. 7. § 2). A child in the testator's power, if named heir, was liable to any legacies charged on him, and if with those who were passed over he received possession of the property, he would share with them the payment of the protected legacies, but so that the Falcidian fourth was reserved for the heir, and the legacies were abated so that no legatee should get more than a child (D. XXXVII. 5. l 14. § 1; l 6). A child in the testator's power, if passed over, succeeded to the possession as if no will had been made, and the legacies, if there were no other heir on whom the legacies were charged, fell altogether (ib. l 15. pr.). A child disinherited could do nothing except impeach the will of undutifulness (ib. l 8. pr.; see note below on l 57).

In the case mentioned in the text a stranger is instituted heir: an emancipated son is passed over. Whether any other son was instituted heir also is not said; apparently not. The emancipated son claims his rights and obtains the *bonorum possessio.* The stranger is ousted altogether. The deceased had bequeathed to his mother the property in something (it is not told us in what) reserving the usufruct. The bequest would be maintained. The usufruct thus reserved would have belonged to the heir or heirs instituted by the will: as the will is upset, who is to have this usufruct? the son as *de facto* in the position of heir? or the mother as having the ownership (or reversion) of the thing? For the son it might be argued that anything not specifically bequeathed fell to the heir; and the son was now put by the praetor into the heir's shoes. For the mother it might be urged that the usufruct had been reserved only for the benefit of the heir appointed by the testator, and certainly not for the son whom the testator had passed over altogether: consequently it would escheat to the proprietary, i.e. to the mother (see l 36. § 1). However, regard for the duty of a son to his mother decided the point in favour of the mother, who would receive the full ownership. Godefroi refers to another decision made *pietatis intuitu* (D. XXXII. l 41. § 2).

extraneo] see note on l 67.

§ 1—l **47.** A direction by a testator to his heir, to repair a block of houses of which he has bequeathed the usufruct to another, is enforceable against the heir; and if he neglects, and the fructuary dies, the fructuary's heir, although the usufruct ceased at the death of the fructuary, can sue the heir for the damage caused to the fructuary by the heir's neglect.

l **47. cessasse**] 'delay in fulfilling his duty'. Cf. D. XXXIX. 2. l 32 *Si unas aedes communes tecum habui eaeque uitium faciant et circa refectionem earum cessare uidearis*, &c.; IV. 4. l 38. pr. and often. See on l 13. § 2. (p. 103).

l **48. quasi negotium gerens**] 'Assuming to be acting for the fructuary'. *quasi* does not imply that this was a pretence but only that the heir's position was such that his own interest may have partly induced him to take action. Comp. however note on l 13. § 8 *quasi domum* (p. 113). For *negotium gerens* see on l 12. § 2 (p. 85).

non est cogendus reficere] On *reficere* see l 7. § 2, p. 58. On the option given to the fructuary to surrender see l 64.

sed actione neg. gest. liberatur] 'but on the contrary is freed from liability to an action on the part of the heir for the cost of business done by the heir in making repairs.

§ 1. **siluam caeduam**] See on l 9. § 7 (p. 77).

in fructu esse constat] 'It is well-established law that a plantation, though lopped too soon, is still reckoned as belonging to the usufructuary'. Heimbach (Weiske's *Rechts-Lex.* XI. p. 895) well points out that, if the property in the produce in such a case did not vest in the fructuary, difficulties would arise in the disposal of it, and the usufructuary's proper exercise of his right would be in question on every petty sale. On the general question see note on l 12. § 5 *maturos* p. 91.

olea immatura] The unripe olives give better oil: the ripe olives yield more oil (Schneider). Cato *R. R.* 65 says *Quam acerbissima olea oleum facies, tam oleum optimum erit: domino de matura olea oleum fieri maxime expediet;* ib. 58 *oleas tempestiuas, unde minimum olei fieri poterit eas condito.* But Columella distinguishes between *acerbum* or *aestiuum oleum* which is made before December; *uiride* made about December; *maturum* made afterwards. The *uiride* pays best; *quoniam et satis fluit et pretio paene duplicat domini reditum* (XII. 52. §§ 1, 2, 20). Cf. D. XXXIII. 2. l 42 *Cum olea immatura plus habeat reditus quam si matura legatur, non potest uideri si immatura lecta est in fructu non esse.*

l **49.** In the case put each of the usufructuaries has an action against each of the two heirs. The double concurrence results in each heir being liable to each usufructuary for a quarter of the whole.

a Sempronio] 'from Sempronius', see on l 7. § 2. fin. p. 15; l 13. § 1.

in parte] Cod. F. has twice *partem* followed by (once) *parte*. The latter is right. I have corrected the two former accordingly.

l **50.** Paulus here gives an answer of Scaevola to a case put to him.

The case and answer are given from Scaevola's *Digesta* in D. XXXIII. 2. l 32. § 5. Paulus quotes it almost literally, the only changes being *Titius Maeuio* for *Lucius Titius testamento suo Publio Maeuio, quaesitum est* for *quaero*, and *respondit Scaeuola* for *respondit*. See Part I. s. v. Scaevola.

eius fidei commisit] 'committed to his honour', i.e. created a trust in favour of Titia for the usufruct of one-half of the estate: or, as we should say, left it to Maevius, as regards one-half in trust for Titia for her life with remainder to Maevius. The words were originally used in the ordinary sense (e.g. Ter. *Eun.* 886 *Ego me tuae commendo et committo fidei;* Cic. *Verr.* II. 1. § 1 *de his rebus quae meae fidei commissae sunt*, &c.), but afterwards became technical. Some cases mentioned by Cicero shew the way in which trusts grew up. A. Trebonius had a brother proscribed by Sulla, and a *lex Cornelia* forbad aid to be given to the proscribed. Trebonius in writing directed his heirs to take an oath to give to his brother each one-half of his share. A freedman took the oath: the other heirs declined. Verres excluded the freedmen and gave possession to the others. Cicero concedes the legality of Verres' action, but comments on its inequitable character (*Verr.* I. 47. § 123). Q. Fadius Gallus made P. Sextilius Rufus his heir, and in his will stated that he had requested the heir to arrange for the whole inheritance coming to the testator's daughter. This was contrary to the *lex Voconia*, which forbade a man registered as having 100,000 asses (Gai. II. 274) making a woman his heir or bequeathing to anyone more than half the estate. Rufus consulted his friends what he should do: no one recommended him to give more than was allowed by the *lex Voconia*, but Cicero implies that he ought morally to have given the whole. Apparently he gave the daughter only half (*Fin.* II. 17. § 55). C. Plotius made Sex. Peducaeus his heir, and secretly requested him to hand over the inheritance to his daughter; which he did (ib. 18. § 58). Q. Pompeius Rufus (Sulla's grandson) had been condemned in a criminal trial for violence (*de ui*) and was in exile (Dion Cass. XL. 55; Cael. ap. Cic. *Fam.* VIII. 1. § 4). The prosecutor was M. Caelius Rufus. Some land was left to his mother Cornelia with a trust (*fidei commissa praedia*) for him, which she did not carry out. Pompeius asked Caelius to take up his cause. He did so, and was successful in a legal trial (*iudicio*), of what nature is not stated (Val. Max. IV. 2. § 7). Gaius (II. 268—288) enumerates many matters in which it was possible to effect by a trust what was inconvenient or impossible to do directly. Augustus first gave legal sanction to trusts by directing the consuls to enforce them: eventually a special judge was created for them, called *Praetor fidei commissarius* (Inst. II. 23. § 1). At first when the law recognized trusts, the heir who was charged with a trust to give up the inheritance remained legally heir, but by certain contrivances the benefit and burden were transferred to the *cestui que* trust. This was gradually simplified (Gai. II. 246 sqq.; Inst. II. 23). The usual words

used in creating a trust were one or more of the following, *peto, rogo, uolo, fidei committo* (Gai. II. 249). Numerous instances are found in the Digest, e.g. XXXI. l 77. Justinian put legacies and trusts on the same legal footing and with the largest powers which either of them previously had. The form of words ceased to be of importance (Cod. VI. 43. l 2; Inst. II. 20. § 3). Hence the words of Ulpian must have been altered by Tribonian to the form now given them in D. XXX. 1. l 1.

uillam—aedificauit] 'rebuilt a farm-house which was ruined by age but necessary for collecting and storing the produce'. Columella (I. 6) speaks of farm-houses having three parts, *urbana (uilla)*, for the proprietor; *rustica*, for the farmer and his slaves; *fructuaria*, for the produce. For *corruptam* see note on l 13. § 2, p. 104. *Cogere* is used of the olive-harvest, Cat. *R. R.* 31; 64; of grapes, Col. XI. 2. § 70; D. VII. 4. l 13; and generally Varr. *R. R.* I. 6. § 3; Col. XII. 3. § 9; D. XXXIII. 7. l 8. pr.; VI. 1. l 78.

agnoscere] See l 7. § 2. note (p. 62).

si priusquam u. f. praestaretur, &c.] One does not understand what so pressing necessity there can have been for the heir's action. Why should not the usufruct have been established at once? Possibly because, as half only was left to the *cestui que* trust, some negotiations may have been necessary to arrange for a division; and the legatee may have been absent from the country. However that be, all that is decided is, that, if the heir was obliged to build before carrying the legacy into effect, the fructuary must pay his share. Whether the fact was so or not is another question, and quite unimportant to the statement of the principle of the law.

non alias cogendum quam haberetur] 'that the heir cannot be compelled to give effect to the trust except on the terms that account be taken of this expense'; i.e. the *cestui que* trust must pay his share.

The expression *non alias...quam* with the subjunctive may be defended as analogous to *non prius quam*. Another instance occurs in D. XL. 7. l 40. § 7 *Respondit legata quidem et libertates non alias competere quam rationes redditae essent.* Similarly, not only in language but in meaning, D. XX. 1. l 29. § 2 *Respondit non aliter cogendos creditores creditoribus aedificium restituere, quam sumptus in exstructione erogatos...reciperent* (where Mommsen in his edit. proposed to read *quam ut*, and Huschke, *Pandektenkritik*, p. 12 *quam si*). Frontin. *Strat.* I. 10 *neque aliter principes eorum redire posse quam ipse remissus foret* is practically the same thing. *Quam ut* or *quam si* is the usual phrase in such cases. Mommsen suggests inserting *ut* in our passage. *Non aliter...quam ut* occurs in D. XXX. l 70. § 1; *non aliter...quam si* in Gai. II. 168; 195; IV. 119; D. I. 7. l 18; XXX. l 84. § 5; *non alias...quam si* D. XII. 2. l 13. § 5; XXIX. 5. l 5. § 2; *non alias...nisi* above, l 40.

restituere] see on l 5 (p. 47).

sumptus ratio haberetur] Cf. D. X. 2. l 39. pr.; XXIV. 3. l 7. pr., &c.

l **51.** The usufruct being in fact the life interest, it was a mere mockery to bequeath it to a man for the moment of his death. Cf. D. XXXIII. 2. l 5 *Usumfructum 'cum moriar' inutiliter stipulor: idem est in legato, quia et constitutus ususfructus morte intercidere solet;* XXXV. 1. l 79. § 3. So of a dowry promised for the time of the woman dying, D. XXIII. 3. l 20.

inutiliter] 'without effect' i.e. the legacy is invalid. Cf. Gai. II. 123; &c.

in id tempus uidelicet collatus] 'fixed as it is for a time at which' &c., or 'of course because fixed'. *Uidelicet* introduces an obvious fact, usually in explanation of a preceding statement. Cf. D. III. 1. l 1. § 5 *Caecum utrisque luminibus orbatum praetor repellit (a postulando): uidelicet quod insignia magistratus uidere et reuereri non possit;* XXVII. 1. l 30. § 1: but also not in explanation XIX. 2. l *Quid si locauit...quasi fundi dominus, uidelicet tenebitur; decepit enim conductorem.*

collatus] Gai. III. 100 *Si quis ita dari stipuletur 'cum morieris dari spondes', id est, ut in nouissimum uitae tempus stipulatoris aut promissoris obligatio conferatur;* D. XXVIII. 3. l 16 *in futurum collatae conditiones;* Cic. *Att.* VI. 1. § 24 *Haec omnia in mensem mortuum sunt collata;* Plin. *Pan.* 61 *Si unius tertium consulatum eiusdem in annum contulisses.*

l **52.** **si tributa eius rei praestentur**] 'If taxes on the property (which is the subject of the usufruct) be paid', i.e. if it is subject to taxes. So *si quid pendatur*, l 127. § 3.

The burden of taxes falls on the fructuary, as was said before (l 7. § 2; l 27. § 3), unless there be a special trust directing the heir to pay the taxes. Arrears of rates and taxes were presumably payable by the heir without such special direction. (See note on l 7. § 2, p. 62.)

l **53.** The usufruct of a block carries with it the usufruct of the supporting ground; but if the block of buildings be removed, the usufruct is gone, and there is no claim to a usufruct in the vacant ground. So much was laid down in l 36. pr. *contra autem*, &c.; VII. 4. l 5. § 2. But the removal of part of the building does not extinguish or affect the right to the usufruct of the ground either in whole or in part. The ground is accessory to the block of buildings and accessory as a whole; and, as long as any of the building remains, I retain my right to the usufruct in the building and accessories. Cf. D. VII. 4. l 8; l 9 *Fundi usufructu legato si uilla diruta sit, ususfructus non exstinguetur, quia uilla fundi accessio est: non magis quam si arbores deciderint. Sed et eo quoque solo, in quo fuit uilla, uti frui potero.*

l **54.** The usufruct of an estate is bequeathed from the heir to Titius conditionally on some event. The heir sells and delivers the estate, before the condition takes effect, but reserves the usufruct. To whom does the usufruct belong under the different possibilities? Until the condition takes effect, the heir has the usufruct. If the condition takes effect, the usufruct passes from him to the legatee. On the death

or forfeiture of the legatee, it reverts to the ownership, which has passed from the heir to a purchaser. If the condition does not take effect, the legacy drops, and the question now arises does the usufruct continue with the heir in virtue of his reservation on the sale of the estate? *Prima facie* it does, but all depends on the real intentions of the parties to the sale (compare l 36. § 1). If the heir reserved the usufruct merely in order to satisfy the contingent bequest, and this was understood as part of the bargain, then the usufruct reverts to the purchaser as bare owner of the estate. If this was not the bargain but the heir reserved the usufruct for himself, subject to the contingency, then on the contingency failing the heir enjoys his usufruct.

intellego te de usu fructu, &c.] i.e. I understand you to be asking not who has the usufruct reserved on the sale: (that of course belongs for the time to the heir) but who has the usufruct which was as it were contingently separated from the ownership by the testator in his bequest? There are not really two usufructs of the same estate: but two creations of a usufruct, one certain, but apparently temporary, by the reservation on the sale: the other contingent on the occurrence of some event.

ad proprietatem fundi reuertatur] The usufruct on being lost reverts to the propriety as its natural home (l 3. § 2; l 36. § 1). But, it may be said, the heir in selling the estate had expressly reserved the usufruct: consequently the usufruct, on being set free from the legatee, will come to the heir. To which the answer is that only the owner can create a usufruct. The heir while owner did create by reservation a usufruct, but that usufruct could only last until the condition took effect, because the testator had already created a usufruct to run from the happening of that event. The usufruct created by the heir then came to an end: the usufruct created by the testator commenced; and on its expiring the ownership becomes full again and only the owner can create another usufruct. A usufruct is not a continuously existing right distinct from but parallel to the ownership, so that it can be carved out into successive periods and disposed of to successive beneficiaries. It is a right attached for a time to a particular person and dies absolutely on being dissevered from that person. Compare note on l 34. pr. *legatum non habebit* (p. 202) and D. VII. 6. l 4.

ita ut in eius persona] 'subject however to the application to his person of the same rules of law which are regularly observed in reference to the loss of a usufruct'. We must assume the condition attached to the legacy to be one of such a kind that not merely its non-occurrence but the impossibility of its occurrence is ascertained (e.g. if Titius within five years from the testator's death shall be consul: the five years elapse without his becoming so). Then the contingent usufruct which would have been attached to Titius' person fails altogether, and the usufruct reserved at the sale alone remains in question. This is attached to the

heir's person and will remain with him, only so long as he lives, and has not his 'head broken', and continues to use it. Javolenus (by the words *in eius persona*) apparently wishes to guard against the idea that there is only one usufruct in question, viz. that attached contingently to the *persona* of Titius, and that this usufruct will live and die with Titius, though actually enjoyed by the heir. The usufruct was not an estate for the life of Titius and consequently now held by the heir *pur autre vie*. The person of the testator's heir, not that of Titius, is now concerned.

spectandum id erit, quod, &c.] All depends on the understanding of the parties. Cf. D. XVIII. 1. l 41 ; 6. l 7. § 1 ; VIII. 5. l 20. § 1.

restitui a uenditore] The usufruct was with the heir, who was vendor. The estate itself had been conveyed: the vendor had now to put the purchaser in possession of the usufruct, cf. note on l 3. pr. *induxerit*, p. 35. For *restituere* see note on p. 47.

l **55. infantis**] See note on l 12. § 3, p. 87. The infant here is of course a slave. The age of seven which was applied to define infancy in some cases would suit this passage fairly well. He could hardly be of use before that age.

usus tantummodo] Why is the 'use' only mentioned, and indeed emphasized, as if in opposition to *ususfructus*? And why is the extract placed here instead of in title 8? I cannot answer these questions.

The 'use' of a slave included the personal services of the slave for the usuary and his family, and a slave was a legal channel for the acquisition by the usuary of property by stipulation or delivery, provided that the usuary's property was employed for the purpose. But the usuary had no right to hire out the slave's services, and could not therefore acquire anything in remuneration for them. In short the usuary could through the slave acquire *ex re sua*, but not *ex operis serui* (D. VII. 8. l 12. § 5—l 14 ; l 16. § 2). To act as stipulant or receiver was a service which could not be performed by an infant: but time only was required to bring about the possibility of such a use. And the expectation it appears was sufficient to support a legacy of use ; and *a fortiori* to support a legacy of usufruct. A slight foundation was enough, as we may see from l 41 and l 53.

For the subject matter of this extract compare l 12. § 3 ; and Paul. *Sent.* III. 6. § 18 *Furiosi et aegrotantis et infantis ususfructus utiliter relinquitur: horum trium alius resipiscere, alius conualescere, alius crescere potest.*

l **56.** The subject of this law is treated also in an extract from Gaius forming D. XXXIII. 2. l 8, but there confined to bequest. *Si usus-fructus municipibus legatus erit, quaeritur quousque in eo usufructu tuendi sint: nam si quis eos perpetuo tuetur, nulla utilitas erit nudae proprietatis semper abscedente usufructu. Unde centum annos obseruandos esse constat, qui finis uitae longissimus esset.* A community in order to act must act as a whole, and that required a representative, who was usually a slave

of their own, through whom they made and accepted stipulations, gave and received by mancipation, entered on inheritances, brought and defended suits. For conducting actions a citizen or other freeman was formally appointed, and if he was used for making stipulations &c., a *utilis actio* was granted on such stipulations to the administrator (D. III. 4. 11. § 1; l 6. §§ 2, 3; l 10; XII. 1. l 27; XIII. 5. l 5. §§ 7, 9; XV. 4. 14; XLV. 3. l 3). Only by legacy in the form *do lego* could a town acquire a usufruct duly constituted in the earlier times: mancipation was not available at all, and a slave could not be a party to a surrender in court. So that the usufruct, if given by a living person, would be only informally constituted by bargain and stipulation. Hence it would require the protection of the praetor (Savigny *Syst.* II. p. 289). And the praetor would be also called into action if, the usufruct being left *per damnationem*, the heir did not put the town into the *de facto* possession of the usufruct, or if anyone disturbed the town in the enjoyment.

For the power of a town to own land see D. I. 8. l 6. § 1, &c.; to possess through slaves and others, D. XLI. 2. l 1. § 22; l 2; to own servitudes, D. VIII. 1. l 12; to make loans, D. XXII. 1. l 11. § 1; to receive loans, D. XII. 1. l 27; to make stipulations, D. XLV. 3. l 16; to receive legacies, first allowed by Nerva, Ulp. XXIV. § 28; to have *bonorum possessio*, D. XXXVII. 1. l 3. § 4; to be heirs—but in Ulpian's time only to their freedmen's property, Ulp. XXII. 5; a right extended by the Emperor Leo to all, Cod. VI. 24. l 12. The right of emancipating their slaves was granted by a senate's decree A.D. 129, in extension of a previous right, Cod. VII. 9. l 3; D. XL. 3. l 1; and the full rights of a patron conceded to them (D. XXXVIII. 3). All towns under Roman rule were allowed by the Sc. Apronianum (A.D. 117? 123?) to receive an inheritance by way of trust, and were required to appoint an *actor* to bring and defend consequent actions, D. XXXVI. 1. l 27; l 28. pr. See Savigny *Syst.* II. §§ 89—93.

usus fructus nomine] 'by the title of usufruct,' i.e. 'to enforce or recover their right of usufruct'. Cf. D. VII. 5. l 8 *ususfructus itaque nomine partem pecuniae petendam ab eo qui satis accepit a coherede, incertique cum eo agendum, si satis non dedisset;* and again *neque fructus nomine interim teneri;* 9. l 7. pr. *si ususfructus nomine re tradita satisdatum non fuerit;* XLIII. 16. l 3. § 17 *Qui ususfructus nomine qualiterqualiter fuit quasi in possessione, utitur hoc interdicto (de ui).* Similarly *hereditatis legatorumue nomine capere* (Gai. I. 24): *fideicommissi nomine semper in simplum persecutio est* (II. 282); *damni nomine actionem introduci manifestum est* (III. 216); *tributorum nomine praestari* (XIX. 1. l 13. § 6); &c.

municipibus] 'the burghers', i.e. in their collective capacity. Cf. D. XXXIV. 5. l 2 *Ciuibus ciuitatis legatum uel fideicommissum datum ciuitati relictum uidetur;* III. 4. l 2 *Si municipes uel aliqua uniuersitas ad agendum det actorem, non erit dicendum quasi a pluribus datum sic*

haberi: hic enim pro republica uel uniuersitate interuenit, non pro singulis; ib. 1 7 *Sicut municipum nomine actionem praetor dedit, ita et aduersus eos edicendum putauit...Si quid uniuersitati debetur singulis non debetur, nec quod debet uniuersitas singuli debent;* I. 8. 1 6. § 1; XLVIII. 18. 1 1. § 7. Savigny says *municipes* is the term most generally used for a community and was applied to a colony as well as a *municipium* properly so called (*Syst.* II. p. 249).

actio dari debeat] The doubt was not due so much to the difficulty of getting over any absence of due formality in constituting the usufruct, as to the apparent incongruity of a strictly personal right, which was always terminated by the death or loss of civil position of the holder, being recognised in a body which did not die and was not likely to lose its position in the state.

neque morte nec facile cap. dem.] The corporate character was taken away from Capua as a punishment for its adherence to Hannibal, LIV. XXVI. 16 *Urbs seruata est ut esset aliqua aratorum sedes,...ceterum habitari tantum tamquam urbem frequentarique placuit; corpus nullum ciuitatis nec senatum nec plebis concilium nec magistratus esse; praefectum ad iura reddenda ab Roma quotannis missuros.* Such a condition may be considered analogous in a community to *capitis deminutio* in the case of a man. Carthage on the other hand was utterly destroyed. App. *Lib.* p. 135 Καρχηδόνος εἴ τι περίλοιπον ἔτι ἦν, ἔκριναν οἱ Ῥωμαῖοι κατασκάψαι Σκιπίωνα καὶ οἰκεῖν αὐτὴν ἀπείπον πᾶσι, and this was by Modestinus compared to the death of a man, D. VII. 4. 1 21 *Si ususfructus ciuitati legetur et aratrum in ea inducatur, ciuitas esse desinit, ut passa est Carthago, ideoque quasi morte desinit habere usum fructum.* Cf. Hor. *Od.* I. 16. 20. When Gaius says a burgher-community will not die, he merely means to contrast the continuous ideal life of a corporation with the limited physical life of a man. Possibly he would have regarded Carthage as having undergone, not death, but *cap. dem. maxima.*

proprietas inutilis, &c.] See 1 3. § 2.

tuendi in eo us. fr. municipes] i.e. by the praetor allowing them according to circumstances to bring an action or make a plea, as if they were a real person. Thus though statues in public places were not the property of the citizens, the community was allowed to bring and defend suits against private persons attempting to remove them, and even against those who placed them there; *Tuendi ciues erunt et aduersus petentem exceptione et actione aduersus possidentem iuuandi* (D. XLI. 1. 1 41). So *tueri* is used of the praetor's action in respect of some water rights not strictly servitudes *licet seruitus iure non ualuit, si tamen hac lege comparauit seu alio quocunque legitimo modo sibi hoc ius acquisiuit, tuendum esse eum qui hoc ius possedit* (VIII. 4. 1 2); of slaves informally emancipated (i.e. not *uindicta* nor *censu* nor *testamento* Dosith. 5) *per legem Iuniam eos omnes quos praetor in libertate tuebatur liberos esse coepisse* (Gai. III. 56); of a pledgee where the pledgor had not full legal

ownership (D. XX. 1. l 18); of the pledgee of a usufruct (ib. 1. l 11. § 2); of a pledgee before the debt was actually due (ib. 4. l 9. pr.); of the holder of a building on another man's ground, *tuetur praetor eum qui superficiem petit* (XLIII. 18. l 1. § 2); of anyone sent into possession, *conuenit praetori omnes quos ipse in possessionem misit tueri* (XLIII. 4. l 1. § 2); but emancipated sons or patrons, who having neglected to apply for possession *contra tabulas* claim as if on an intestacy, *non solet tueri praetor aduersus scriptos heredes* (XXXVIII. 6. l 2); and in other cases, *si res talis sit ut eam lex aut constitutio alienari prohibeat, eo casu Publiciana non competit, quia his casibus neminem praetor tuetur ne contra leges faciat* (VI. 2. l 12. § 4). See also note on l 25 fin. *per traditionem* (p. 174) and D. VII. 4. l 1. pr. there quoted.

l 57. The usufructuary of an estate has the estate bequeathed to him, and after enjoying it for some time has to restore it to the son of the testator, who has succeeded in upsetting the will. For the time the usufruct has been apparently merged in the ownership: but it revives as a separate right on the ownership being under these circumstances withdrawn again. A similar case is given in D. XXXVIII. 2. l 35, where the ownership was withdrawn by *bonorum possessio* being granted *contra tabulas*. For cases of effectual merger see above l 34. § 2; l 36. § 1.

inofficiosi test.] The *querela inofficiosi testamenti* was a proceeding to have a will annulled on the ground of its being wanting in due respect to the claims of near relations. The testator is supposed so far not to have been in his right mind (*non sanae mentis*, D. v. 2. l 5), if he passed over or disinherited one who had a claim and was not undeserving. Such a claim, if proved, was good on behalf of children impeaching their parents' will, or of parents impeaching their children's; or as between brothers and sisters; but only if and so far as the claimant would be the heir or an heir, if the testator had died intestate (ib. l 1; l 6. § 1; l 15. § 2). The claim was defeated, if the claimant received under the will or in contemplation of the testator's death a fourth of the inheritance after debts and funeral expenses and the value of slaves manumitted were deducted. If there were more persons in the same order of succession, each could only claim his share of the fourth (l 8. §§ 6—9; l 25). Any action of the claimant under the will, or in recognition of it as valid, forfeited his claim (l 23. § 1; l 12. § 2). This suit was in addition to other remedies, especially to the right of claiming the *bonorum possessio contra tabulas* (above, p. 214 sq.). But an emancipated son passed over in his father's will could not impeach the will, if his own son still in the grandfather's power was made heir (l 23. pr.). On the other hand the *bonorum possessio* was not open to a disinherited child (D. XXXVII. 4. l 8. pr.). A will pronounced undutiful was null for all purposes, legacies and freedoms included (D. v. 2. l 8. § 16).

recte pertulerat] 'duly carried', i.e. succeeded in his suit. So also D. v. 2. l 16. § 1; cf. XXXVIII. 2. l 14. § 8. The more usual phrase is *obtinuit*. For *recte* see supr. l 9. pr., p. 68.

ex post facto] depends on *apparuit*. From what happened afterwards, it was clear that the right of usufruct remained unmerged, i.e. the subsequent event, viz. the success of the son in upsetting his father's will, shewed that the ownership had never devolved on the usufructuary (for the will was invalid), and consequently there had been no merger of the original right into a right which never really existed. For *ex post facto* cf. D. XXXIV. 5. l 15 (16) *Quaedam sunt, in quibus res dubia est sed ex post facto retro ducitur et apparet quid actum est;* XL. 4. l 7; XLIII. 24. l 7. § 4; &c.

§ 1. **ob alimenta**] see on l 7. § 2, p. 63.

partium emolumentum, &c.] i.e. as the freedmen died, their shares in the usufruct reverted to the owner (lit. the profit of shares comes from the person of those dying, &c.).

l **58**. The principle of this law is that, as soon as the fruits are gathered by the farmer, the right of the fructuary to the rent is vested, although the rent is not payable till the 1st March. The farmer is the agent of the fructuary for the purpose of exercising the right to take the fruit (l 12. § 2; l 38), but the fruits when gathered are not the property of the fructuary but of the farmer by the terms of the contract, which gives him the right of enjoyment (D. XIX. 2. l 15. pr.; § 8), see note on l 26, p. 176.

kal. Mart.] The 1st of March was the beginning of the year. *Hoc mense mercedes exsoluebant magistris quas completus annus deberi fecit, comitia auspicabantur, uectigalia locabant*, &c. (Macrob. *Sat.* I. 12. § 7).

inferri] *Inferre* 'bring in', i.e. pay, so D. XXXIII. l. l 21. § 5; XXXI. l 34. § 5 *pretio illato;* XXXIX. 4. l 7. § 1 *uectigal intulisset*, &c.; Cod. Theod. VI. 22. l 2 *illatio* 'payment of taxes', &c.

rem publicam quidem—habere] The bargain was made between fructuary and farmer, the state was not privy to it. Hence the state can have no claim to the fruits gathered while the usufruct lasted nor to any commutations of them. On the other hand the state would have the right to turn out the farmers at once, and if they allowed them to stop would make such contract with them as might be agreed on for future occupation and rent. That would not affect the right of the fructuary's heir to recover from the farmers the rent for the past year when due.

sua die] 'on the day', *sua* relates to *pensionem*. *Suus* is frequently used in the law writers in the sense of 'properly belonging', D. XLV. 1. l 48 *Qui sic stipulatur 'quod te mihi illis kalendis dare oportet, id dari spondes?' uidetur non hodie stipulari, sed sua die, hoc est, kalendis;* XXIII. 3. l 43. pr. *Scaeuola ait matrimonii causa acceptilationem interpositam non secutis nuptiis nullam esse atque ideo suo loco manere obligationem*, 'it remains as it was'; XLII. 8. l 17. § 2 *Hac actione mulier tantum praestabit, quanti creditorum intererat dotem suo tempore reddi.* So the phrases with *quisque* attracted into the case of *suus*, e.g. D. XIII. 7. l 8. § 3 *Si annua bima*

trima die triginta stipulatus, acceperim pignus pactusque sim ut nisi sua quaque die pecunia soluta esset, uendere eam mihi liceret, &c. (cf. Lat. Gr. § 2288). In the later legal Latin *suus* is used objectively without any word to which it grammatically refers, e.g. Cod. VI. 50. 1 11 *Auxilium legis Falcidiae, quod imploras, apud suum iudicem non prohiberis flagitare;* and in certain phrases, e.g. *sui iuris*, D. XLVI. 2. 1 20 *Nouare possumus aut ipsi si sui iuris sumus; suus heres*, Gai. III. 29 *Feminae adgnatae tertio gradu uocantur, id est si neque suus heres neque adgnatus ullus erit.*

§ 1. **ex redactu fructuum**] 'from the produce of the crops'. Cf. D. XLVI. 3. 1 88 *Res uendendas per argentarios dedit; argentarii uniuersum redactum uenditionis soluerunt.* The verb *redigere* 'to get in money', &c., is common both in law writers and generally, e.g. D. X. 2. 1 51 *Fructus post litem contestatam percepti ad eum redigendi sunt habita ratione impensarum;* Liv. II. 42. § 2 *Quicquid captum ex hostibus est uendidit Fabius consul ac redegit in publicum.*

holeris] 'cabbages', Pliny *N. H.* XIX. 136 *Olus caulesque quibus nunc principatus hortorum apud Graecos in honore fuisse non reperio, sed Cato brassicae miras canit laudes;* Cato *R. R.* 156 *Brassica est quae omnibus holeribus antistat.* Columella II. 10. § 22 speaks of *rapum* as *olus*, and the *genus Brassica* now comprises cabbage, cauliflower, broccoli, rape, turnip, colza, &c. For the spelling, in D. VII. 8. 1 12. § 1 we have both *holeribus* and *oleribus; holus* is the MSS. reading in Horace almost always; see Keller's *Epil. ad Sat.* I. 1. 74.

porrinae] 'leek' or 'leek bed'. Cato uses the same form, *R. R.* 47 *quotannis porrinam serito;* and Arnob. II. 85 *Quid sit triticum dicito, far, hordeum, cicer, lenticula, porrina, caepe.* So *rapina*[1] in Cat. *R. R.* 5. § 8; 35. § 2; Col. XI. 2. § 71 *napinae itemque rapinae siccaneis locis per hos dies fiunt: caepina* in Col. XI. 3. § 56. The longer adjectival forms were used apparently for the herb-beds or crops (*seges* or *segetes* being understood); the simple forms *porrum, napus, caepa*, &c. denoting either the crop or a single head. The quantity of the penult (*porrĭna* or *porrīna*) appears not to be positively ascertainable. It is generally taken to be long.

quae habeo] 'which properties I have'.

Farrariorum] Mommsen suggests *Farraticanorum*, as there is a *pagus* of that name in the territory of Cremona (Henzen *Inscr.* n. 6132 = *Corp. I. L.* v. 4148. There is also one in the district of Placentia, *Corp. I. L.* v. 7356; also named in *Tab. alim. Velleiat.* 3. 48. The district where Ferrara now stands was in ancient times marsh or sea (cf. Mommsen *Corp. I. L.* v. p. 225).

respondi non usum fructum] The bequest was held not to be

[1] Godefroi on our passage compares *rapina* in D. XXXI. 88. § 16 and there actually translates *ei rapinam facere* by *rapas ferre et locum iis serendis parare*, 'slew our son while making a rape bed'! (instead of 'while robbing him'. For *rapinam facere* cf. Cic. *Att.* XIV. 14. § 5; D. IX. 1. 1 1. § 1).

one sixth share of the usufruct of the herb and leek garden, nor (which comes to much the same thing, see note on p. 44 *pro parte indiuisa*) the usufruct of one sixth part of the garden, nor a usufruct under the senate's decree (cf. D. VII. 5. l 7) which would have involved replacement ultimately by the legatee, but simply one sixth share of the produce of these beds or gardens. A usufruct would have involved both giving security for restitution and also forfeiture by *capitis deminutio* and non-use. Nor would his claim be vested until he had in some way gathered or got possession of the produce. Scaevola's decision put the legatee so far in a better position (cf. D. XXXIII. 1. l 8). But the control of the garden would not be so much under the fructuary, as if he had had a proper usufruct.

§ 2. **quotannis uideri relictum**] The bequest was couched in general terms, and, as it related to garden produce, which naturally recurs, was held not to be a mere gift of a sixth of the last or of the next year's crop, but of an annuity, unless the testator's heir could prove that this was not the meaning (cf. D. XXXIII. 1. l 20. § 1; l 23). The annuity in such cases was always held to expire at the legatee's death (D. XXXIII. 1. l 8; l 12; l 22). The extract from Paulus in D. VII. 9. l 6 which deals with a case like ours is apparently somewhat corrupt. See Mommsen's note.

l 59. Trees blown down but good for timber did not belong to the fructuary so that he could sell them, but they might be used by him for the repair of the farm-house or in other ways, though not for firewood, if such could be got elsewhere on the estate (l 12. pr.); and the owner could be compelled to remove them if they were in the way (l 19. § 1). But our text shows that the fructuary is not obliged to replace them or repay their value; as he is in the case of those which die and which then become his property (l 18).

All the MSS. have *substitui*. The Greek commentators are here defective. The sentence, as the MSS. give it, is, to say the least, awkward: *arbores euersas ab eo substitui non placet*. (1) The passive *substitui* and *substitutus* are not elsewhere used of the thing whose place is supplied, but of that which supplies the place of another. Cf. l 18; l 69; 4. l 11; XX. 1. l 26. § 2; &c. Of some, but less weight are the following objections. (2) *Substitui non placet* means that such a substitution by the fructuary is disapproved of, whereas the passage undoubtedly should mean that there is no obligation on the fructuary to supply the place. Hence for *substitui* we should have expected *substituendas esse*, although the use of the simple present is not impossible. (3) It is not so much the duty of the fructuary during the usufruct which is the subject of this fragment, but the eventual liabilities. Hence I have written *restitui*, which may be taken in two ways, either that supposed to be given by *substitui*, i. e. a physical restoration of the trees or of others in the place of them (which however is open to objections 2 and 3), or the way in which it is used

in the fructuary's bond *id quod inde exstabit restitutum iri* (D. VII. 9. l 1. § 7, and notes pp. 59 and 47), which would include not only the surrender of what was left, but compensation for what ought to be there and through his fault was not there. This reading would remove all the difficulties. For the meaning would be the restitution by the fructuary of trees blown down was not approved of, i.e. it did not enter into the settlement by the arbitrator of claims for dilapidations. In either sense *restitui* is preferable to *substitui*. For the physical use of *restitui* cf. Paul. *Sent.* III. 6. § 3 *si domus legata incendio conflagrauerit uel ruina perierit licet postea restituatur*, (the very book from which our extract is taken); Cic. *Top.* 3. § 15, quoted in note on *corruissent*, p. 61.

§ 1. **quidquid in fundo nascitur**] See note on l 9. pr. (p. 67).

pensiones quoque, &c.] On the general law affecting leases when there is a change in the ownership of the property see above on l 26 (p. 176). Three cases are possible. The testator may expressly include in the bequest a right to the rents of leased portions of the estate; or he may expressly exclude them; or he may be silent. In the first case the usufructuary must recognise the lease or leases, but he receives the rent: in the second case the lessees remain the heir's tenants and the heir is entitled to the rents: in the third case the fructuary cannot demand the rent, because that is an obligation created by the contract between testator and tenant which is not enforceable by the fructuary. The fructuary can however eject the tenants or call on the heir to do so, and they must seek compensation from the heir.

exceptae] sc. *pensiones*. If the rents were expressly excepted from the fructuary, this would be taken to relate not merely to the rents then due, but to the rents generally, and hence to imply the limitation of the fructuary's rights by the existing leases. So far the fructuary would as regards these portions of the estate be in a similar position to that of a usuary (cf. D. VII. 8. l 10. § 4), except that he could still let his limited right of usufruct and need not use himself.

conductorem repellere] 'keep the hirer from the land'. Cf. D. XIX. 2. l 54. § 1 *inter locatorem fundi et conductorem conuenit, ne intra tempora locationis Seius conductor de fundo inuitus repelleretur.*

§ 2. **caesae harundinis**, &c.] 'profit from cut reeds and stakes'. If stress be laid on *caesae* and it be taken to mean already cut at the time of the legacy's vesting, the decision would be in conflict with the principle of l 27. pr. and of l 58. pr., which principle would give the profit to the heir. Looking at the word *uectigal*, which seems best understood of some regular payment analogous to rent, and to the fact that the general right of the fructuary to take produce of reed beds, &c., and sell it, has been already given in l 9. § 7, I suppose the present law to relate to cases where a reed bed or underwood was regularly cut by some contractor who paid over a certain share, or percentage, or royalty. The fructuary would be intitled to those payments as he would be intitled to rents,

though he was not a party to the contract in virtue of which they are made. The principle of the last section would apply.

l **60. cuiuscumque fundi**] Probably this means 'whether the estate be in Italy or the provinces'.

prohibitus aut deiectus] The fructuary was not strictly a *possessor*, and therefore if he was prohibited from enjoying or was ejected, he had not a claim to the original interdict *de ui*. But in virtue of his quasi-possession a special interdict was granted him (D. XLIII. 16. l 3. § 13 foll. Vat. Fr. 91). A similar extension of the interdict against a usufructuary is called *utile* (Vat. Fr. 90). The edict however recognised the extension; it was not due merely to interpretation (cf. Schmidt *Interdicten-Verfahren*, pp. 20, 21; Vanger. *Pand.* § 355. anm. 2). The edict used the words '*si prohibeatur uti frui usu fructu fundi*'. The usufructuary must have been in occupation, and must have been either expelled from the land or prevented returning to it. Moveable property came under the protection only as accessory to land. Violence done or threatened to the fructuary, so as to prevent him from using as he chose, founded the right to the interdict (D. l. c. l 11).

omnium rerum simul occupatarum] 'all things seized by the defendant at the same time'. The language of the edict was '*de eo quaeque ille tunc ibi habuit iudicium dabo*', and was explained to cover not only the plaintiff's own property but things deposited with him or lent or pledged to him, or of which he had the usufruct or custody, and which were on the premises at the time of the ejection, even though they afterwards perished (D. XLIII. 16. l 1. § 6; 33—38). Apparently *simul* is equivalent to the *tunc ibi* of the edict. But it may also be taken with *agit*, to imply that one action was sufficient to cover the whole plaint. For *occupare* used of such unauthorised taking, see D. l. c. § 29; XLIII. 3. l 1. § 2; VII. 4. l 26. Hence *agri occupatorii* 'squatters' land', Hygin. p. 115; Sic. Fl. p. 138, Lachm.

medio tempore] 'meanwhile', i.e. before joinder of issue (*litis contestatio*).

alio casu] The inferior MSS. have *aliquo casu* which Mommsen inclines to approve. Krüger adopts it in his edition of Paulus *Sent.* v. 6. § 84. Bas. confirms *alio*: *εἰ δὲ καὶ ἐν τῷ μεταξὺ ἄλλως ἡ χρῆσις φθαρῇ*. And *alio* seems to me to be right. If the usufruct was lost by non-user in consequence of the eviction, the plaintiff has right to more than the text gives: he can claim against the ejector for the full value of the lost usufruct (D. XLIII. 16. l 10). But if it be lost by some other means (*alio casu*) e.g. by expiration of time, or loss of *caput*, or by death, the ejected person or his heirs can claim only for the value up to the date of the loss (ib. l 3. § 17; cf. l 9. § 1), which presumably is the same as the *percepti antea fructus* of our text.

aeque] 'just as much', 'all the same'. So frequently; cf. D. XXIV. 3. l 64. § 4; § 5.

utilis actio] The action is *utilis*, because the plaintiff is no longer fructuary. *Aeque* does not mean that this action is *utilis* like the former, but that a right of action exists in this case also, only it is not given in express terms but is analogous to that given in the edict.

§ 1. This section contains nothing to necessitate its reference to cases of violent eviction like the preceding. The words *usus fructus petitur* are those used of the regular action for enforcing the right of usufruct, i.e. the *uindicatio ususfructus*, otherwise called the *actio confessoria* (D. VII. 6. l 5). There is nothing to imply that the fructuary has been in possession but rather the contrary. The question is this: How far is the right of the fructuary to be in actual possession affected by a contest between two claimants of the propriety or by his own right to the usufruct being in dispute? First the principle is referred to that the usufructuary's action will lie against any possessor whether he has the propriety or not (cf. D. l. c. *utrum aduersus dominum dumtaxat in rem actio usufructuario competat an etiam aduersus quemuis possessorem, quaeritur. Et Iulianus scribit hanc actionem aduersus quemuis possessorem ei competere*). Then two cases are put. (1) The propriety is in dispute, but the usufructuary's right is not disputed. In this case the disputant who is legally possessor of the object must admit the usufructuary to the *quasi-possessio* or detention. The usufructuary *in possessione esse debet* (cf. D. XLI. 2. l 10. § 1; l 52). The disputant who has the legal possession must by our text give him security not to disturb him. This is in fact the condition on which the praetor assigns to one of the disputants the legal possession. (2) The usufructuary's right is itself disputed by the possessor (whether the propriety be in dispute or not). In this case the possessor must either give security to the claimant of the usufruct for the produce or must allow the claimant himself to be in possession. Presumably in both cases the fructuary or claimant of the usufruct will have to give the usual security (1, 2) for proper use and eventual surrender, but in the second case (2) he will also have to give security for the produce itself if his claim is proved invalid.

eum cui usus fructus relictus est] These words appear to be part of the regular bond and leave the question open who is the rightful fructuary. The rightful fructuary, whoever he be, is the only person entitled in that respect to the benefit of the bond.

quamdiu de iure suo probet] 'until he (the possessor) knows his right'. *Quamdiu* with present subj. is in other places also used so as to be practically 'until' ('so long as he is proving'='until he prove'), infr. l 70. pr.; D. VII. 4. l 15; XLII. 5. l 39. § 1 *eius qui ab hostibus captus est bona uenire non possunt, quamdiu reuertatur;* XLIII. 20. l 7 (which is from the same book of Paulus as our text). The future perfect is found in D. XXIII. 3. l 46. pr.; the present indic. in D. XLVII. 5. l 1. § 3.

If the possessor fails in his proof, then he is out of the case altogether, and has no need to give or continue to give security to the fructuary.

Hence the limit to the security. If he establishes his right, then he is no longer the mere possessor bound to give security to all claimants, but the proprietor answerable only to the general law.

This seems to account for the text, which is confirmed also by Bas. Mommsen however wishes to transpose *satisque ei—de iure suo probet* to the end of the extract. I do not see the advantage of this proposal. Rudorff also rejects it (*Z. R. G.* VI. p. 443).

si ipsi usufructuario quaestio moueatur] Similarly *qui de statu eius facerent ei quaestionem* (D. XXXVII. 14. l 5).

differtur] The Flor. has *offertur*, but Bas. has *ὑπερτίθεται ἡ χρῆσις*, which confirms the inferior MSS. in giving *differtur*, and the sense requires it.

cauere ei debet] I have written this for the MS. *caueri*, which evidently requires change or addition. The change from *cauere ei* to *caueri* is very slight, and *debet* may have dropt out by confusion with the following *de*. The subject both of *debet* and *percepturus est* will be the possessor, and *percepturus est* is less likely to be understood of the fructuary if *debet* leads up to it. Mommsen corrects *caueri* into *cauetur ei*.

ipse frui perm.] sc. *usufructuarius*.

l 61. **riuum parietibus inponere**] Bas. *ὀχετὸν ἐπιθεῖναι τοῖς τοίχοις*. Steph. *ῥύακα ἤτοι κατώγεον τοῖς τοίχοις ἐπιτιθέναι* (*κατώγεον* 'basement-room' may perhaps be due to the original text of Neratius, but it is an odd addition in any case). What is meant by *riuum imponere* is not clear. It may refer to a new gutter or channel for carrying off the rain-water from one's own or a neighbour's house (cf. D. VIII. 2. l 1 *fluminum et stillicidiorum seruitutem impedit;* XVIII. 1. l 33 *flumina stillicidia uti nunc sunt, ut ita sint*); or to arrangements for a bath (cf. D. VIII. 2. l 19; l 28). Noodt I. cap. 12, refers it to arrangements for water to flow down the walls for coolness' sake and compares Manil. IV. 261 *undas inducere tectis ipsaque conuersis adspergere fluctibus astra;* ib. 265 *et peregrinantes domibus suspendere riuos;* and Sidon. Apoll. XXII. 207. One would have expected more explanation, if this had been meant. Cujac. (Obs. l. 36=tom. I. p. 33 ed. Prati) conjectures *tectorium* (cf. l. 44) for *riuum*.

Imponere is frequently used of imposing a servitude (e.g. above l 15. § 7; l 19; l 27. § 4), but here it seems to have a physical propriety as well (cf. l 44).

aedificium inchoatum consummare] This is in accordance with the principle laid down in l 13. § 7; but is a point which required distinct decision.

sed nec eius, &c.] Understand *placet*. 'And in fact in such a case it is held that no usufruct is possible'.

in constituendo] See l 3. pr.

utrumque] i.e. *nouum riuum imponere* and *aedif. inchoatum consummare*.

l 62. Mommsen, following the Greeks, which have *δύνανται* (in the text

of Bas. οὐ δύναται appears to be the MS. reading), suggests the insertion of *posse* before *possessionis*. No doubt it might easily have been lost there, but the position is awkward between *montibus* and its dependent genitive. It would be better placed after *possessionis* and probably as easily omitted. Steph. recognises *probe*, so that is not a substitute for *posse* (Mommsen ad D. XVII. 2. l 30 suggests there reading *probe* for *posse*). I do not think however that *posse* is required either by the sense or by the Greek version. 'Hunts' may stand for 'may hunt'. Thus in l 7. § 2 we have *reficere cogi* several times, in l 9. § 1 *cogi posse recte colere.*

in saltibus uel montibus] It was not uncommon for estates to have a piece of woodland on the hills attached to them. Cf. Frontin. Gromat. p. 48 *sunt plerumque agri, ut in Campania, in Suessano, culti, qui habent in monte Massico plagas siluarum determinatas;* also pp. 15; 204.

possessionis] 'a landed estate'. Cf. D. IV. 4. l 38. pr., where the word is used as synonymous with *fundus* and other places quoted above on l 27. § 3 *possessores* (p. 183). It is frequent in the *Gromatici*, e.g. p. 49 *nam per emptiones quasdam solet proprietas quarundam possessionum ad priuatas personas pertinere;* pp. 130; 201; &c.

probe dicitur] 'it is fairly asserted', i.e. the equity of the case demands it. *Recte dicitur* would be 'the opinion is legally right' (see above on l 9. pr. p. 68). *Probe* has generally the meaning of 'decently', 'properly', opposed to *improbe*. Cf. D. XX. 4. l 1. pr.; XXXVI. 1. l 28 (27). § 4; XXXVIII. 1. l 7. § 3; XLVII. 2. l 43. § 9.

Wild animals are not the property of any one, but become by general law (*iure gentium*) the property of the captor whoever he be and wherever he captures them (D. XLI. 1. ll 1—3). There is no restriction on the right to hunt and fish, but to go on private land or interfere with private lakes is a trespass in a hunter or fisher just as in the case of any one else (D. XLVII. 10. l 13. § 7; and XLI. l. c.). Why then should there be any question of the right of the usufructuary? For this reason, that wild animals are not properly produce (*fructus*), and hunting therefore so far does not belong to the fructuary more than to any one else. If however land of which the only produce is the game is the subject of the usufruct, the fructuary is entitled to this produce, whether he hunts it himself or lets it out and takes the rent instead (D. XXII. 1. l 26; supr. l 9. § 5). Our present passage adds to this that the same principle applies where the hunting ground is an adjunct to or part of an estate which, or the bulk of which, is otherwise profitable. The usufructuary by being alone entitled to the *de facto* possession of the land is alone in a position to hunt without trespass, and to exclude others from hunting on the land in question. The use of the land for hunting may be let out to some one, and then the title to the rent is on the same footing as the title to an ordinary occupation rent, or to a royalty or other payment for cutting stakes (l 59). The fructuary's right to exclude even the owner from hunting would be the same as his right to exclude him from a joint use of a house or any other thing,

and is no more inconsistent with the general right of hunting than the general law of trespass is. The general right of hunting is indeed strictly considered nothing more than the non-existence of private property in wild animals till caught, and the acknowledgment of the right of property in them when caught.

The usufructuary's remedy to prevent trespass is his regular action *confessoria*, just as the owner's remedy is *actio negatoria*. It is said by writers of great authority (e.g. Donell. *Comment.* IX. 5. § 24=II. p. 1292, ed. 1841; Wächter *Pand.* § 134 and *Beilage*) that owner and usufructuary have an *actio iniuriarum* against the trespasser, and they rely on D. XLVII. 10. l 13. § 7; which however seems to refer to a different thing altogether, viz. to an action in favour of persons prevented from hunting and fishing in public places where they have an equal right with others. On the right of hunting generally, see some recent discussions by Schirmer *Z. R. G.* XI. 311 sqq.; XVI. 23 sqq. and Wächter l. c.

nec...proprium domini capit] i.e. a wild boar or stag is not the property of the owner of the land on which it is captured: *nullius est sed occupanti conceditur* (D. XLI. 1. l 3. pr.).

sed aut fructus iure aut gentium suos facit] Mommsen has thus transposed the Florentine reading *sed fructus aut iure aut gentium. Fructus iure* is in itself I think an unusual expression, and the order with *iure* is generally reversed (e.g. *non iure seminis sed iure soli*, D. XXII. 1. l 25. pr.). Moreover its contrast with a somewhat different expression (*iure gentium*), and the use of *suos* applied to *aprum aut ceruum*, after the singular *proprium* has been used, are not satisfactory: but the emendation is simple, and the meaning is supported by Steph. and appears to be right. Schirmer l. c. discusses whether the *ius fructus* and *ius gentium* are concurrent or mutually exclusive grounds, and decides for the latter alternative as required by the use of *aut...aut*, instead of *uel...uel*, or *partim...partim*. The *ius fructus* is therefore, according to him, to apply where the *fructus fundi ex uenatione constat* (D. XXII. 1. l 26), and the *ius gentium* in all other cases. But the *ius gentium* must apply in all cases and is therefore concurrent in the case specially mentioned. *Aut...aut* implies that the two rights are different (therefore not *uel...uel*) and that they are each sufficient (therefore not *partim...partim*), but does not exclude the possibility of a man's sometimes having two strings to his bow. Compare the preceding line (*aprum aut ceruum*) and D. III. 1. l 1. § 3 *in quo edicto aut pueritiam aut casum excusauit* (a boy may be *also* deaf). The ambiguity of *aut* in some classes of expressions is pointed out in D. L. 16. l 124, and formed the subject of a law of Justinian (Cod. VI. 38. l 4). Godefroi has from the inferior MSS. *fructus aut iure ciuili aut gentium.*

§ 1. **uiuariis**] 'preserves'. In D. XLI. 2. l 3. § 14 they are distinguished from enclosed woods and compared to *piscinae* for fish. Beasts in *uiuaria* were possessed: in woods were not possessed. Pliny speaks of *uiuaria* for wild boars, &c. first being established by Fulvius Lippinus and

afterwards by L. Lucullus and Q. Hortensius (*H. N.* VIII. § 211); also for deer (§ 115); and dormice (*glires*, § 224). Varro speaks of them under the name of *leporaria, non ea quae tritaui nostri dicebant ubi soliti lepores sint, sed omnia septa, afficta uillae quae sunt, et habent inclusa animalia* (*R. R.* III. 3. § 2; § 8; cf. 12. § 1). At Hortensius' villa *silua erat supra quinquaginta iugerum maceria septa, quod non leporarium sed θηριοτροφεῖον appellabat* (ib. 13. § 2). So also Columella VIII. 1. § 4; and IX. praef. *Mos antiquus lepusculis capreisque ac subus feris iuxta uillam plerumque subiecta domini iis habitationibus ponebat uiuaria, ut et conspectu suo clausa uenatio possidentis oblectaret oculos et, cum exegisset usus epularum, uelut e cella promeretur.* He also describes the mode of inclosing *latissimas regiones tractusque montium* with oaken posts (*uacerrae*) and horizontal poles, in which enclosures were deer, antelopes (*oryges*), roedeer, stags and boars, and speaks of them as kept by some for hunting, by others *quaestui ac reditibus*. Gellius (II. 20) quotes Scipio as having called the enclosures *roboraria*. Seneca speaks of slaves being thrown into *uiuaria* of serpents (*Clem.* I. 20). Gratianus used to shoot at beasts *inter saepta quae appellantur uiuaria* (Ammian. XXXI. 10. § 19). Cf. Hor. *Ep.* I. 1. 79; Juv. III. 308. The word is frequently used of fish-ponds (specifically called *piscinae* Colum. VIII. 16, 17). See Juv. IV. 51 and Mayor's note; Plin. *H. N.* IX. 168—173; Göll's Becker's *Gall.* III. p. 54; and, on the times at which different animals were introduced to Rome, Friedländer *Sittengeschichte*, II. pp. 489 foll. ed. 5.

exercere] 'train'. Bas. translates γυμνάζειν, i.e. 'train for public shows'. Perhaps hunting like the Windsor stag-hunts, so as not to kill or hurt, might come under the word. Noodt I. cap. 7 takes it in the same sense as *nauem exercere* (D. IV. 9. 1 1. § 2), *cauponam uel stabulum exercere* (ib. § 5), *fodinas exercere* (h. t. 1 13. § 5), *exercere possessionem fundi* (D. XXXIII. 7. 1 12. pr.), i.e. to work for profit. But this would not naturally be suggested by *feras exercere*.

possit] The sentence may be regarded as a dependent question, as we say, 'query, whether we may hunt them but may not kill them'. It is however simpler to take *possit* and *sint* as hypothetical subjunctives. So D. XLVII. 10. 1 7. § 1 *Si dicatur homo iniuria occisus, numquid non debeat permittere praetor priuato iudicio legi Corneliae praeiudicari;* XLVI. 3. 1 98. § 6; &c.

alias] attracted into the case of *quas*, and hence *hae* is expressed with the apodosis. *Aliae* would have been simpler.

initio] i.e. 'at the commencement of the usufruct'. As however the same principles would apply to any other additions to the menagerie during the course of the usufruct, Mommsen suggests that *initio* has been wrongly inserted as a contrast to *post*, which last alone is supported by Bas. In the stereotype edition he suggests, as an alternative reading, *inibi* for *initio*. But see next note but one.

post] μετὰ τὴν σύστασιν τῆς χρήσεως, Bas. 'after the usufruct has been established'.

siue et ipsae inciderint] The MSS. have *sibimet* which would be used here in a very unusual way, apparently only to strengthen *ipsae*. The only parallel to this that I can find is D. XLIII. 20. 1 1. § 21 *Si aqua influxerit ipsa sibi me non ducente* where the inferior MSS. have *sibimet* and Mommsen suggests *sibimet non ducenti*. *Sibi inciderint* might be applied to a herd tumbling over one another into the pit, but there is no pertinency in emphasizing such a mode of entrance into the *uiuarium*. The nearest general analogy is *suum sibi;* e.g. Colum. 11 fin. *uuas ne perurantur suo sibi pampino tegito; Lat. Gr.* § 1143. The reading which I have given is a very slight change of letters (*v* and *b* being commonly confused in MSS.) and gets rid both of this difficulty and of the difficulty about *initio*. Bas. takes *post* with *inciderint:* Steph. takes it with *incluserit*.

Incidere is often used of falling into a snare &c., D. IX. 2. 1 29. pr. *Si pecus uicini in eos laqueos incidisset;* XLIII. 24. 1 7. § 8 *si bos meus in fossam inciderit. Delapsae* probably has special reference to the *uiuarium* being constructed as a pit or underneath a high bank so that animals moving on or near the edge would fall into it.

fructuarii iuris sint] 'be at the disposal of the fructuary'.

commodissime sufficit] A short expression for 'the most convenient principle is that it should be sufficient'. Cf. *commodissime dici ait non esse cogendum* (D. XVI. 3. 1 1. § 37); *commodissime id statuatur ut,* &c. (D. XXIX. 1. 1 18. pr.).

ne per...incertum sit] 'lest the difficulty of distinguishing between them should make uncertain the fructuary's rights with regard to the several animals'. *Facultatis ius* seems to be put for 'rightful powers' and *fructuarii facultas* is in effect equivalent to *facultas utendi fruendi:* cf. Ulpian XXIV. 26 *ususfructus legari potest iure ciuili earum rerum quarum salua substantia utendi fruendi potest esse facultas.* See note on 1 9. § 7 *facultas*, p. 75.

per singula animalia] like *per singula genera* below, is 'taking the several animals one after another'; 'going through them' so as to say which belongs to the original stock and which is an addition by the fructuary. For this use of *per* cf. Grom. p. 146 *unicuique possessori per singulos agros certa spatia adsignantur quae suis impensis tueantur*, i.e. each occupier in the several districts has certain lengths of road assigned him to repair; p. 205 *His omnibus agris uectigal est ad modum ubertatis per singula iugera constitutum.*

sufficit, &c.] The solution is given as a practical one. In strict law the original stock would belong to the proprietor, unless they escaped, and the subsequent additions would, by the general law of capture, belong to the fructuary. Whether the offspring of the original stock would, as in a herd of sheep, belong to the fructuary subject to the duty of keeping up the herd, may be doubtful as the animals are wild, but Tryphoninus here practically applies to the menagerie the same principles that apply to a herd of sheep. See below on 1 68 sqq.

quoque] i.e. not merely the same total number but the same number of each kind.

adsignare] 'assign', 'make over', 'allot'. The word is frequently used in this sense, no actual marking or sealing being implied, though this was probably the original meaning. Any action which indicated the appropriation of things to a particular person would presumably suffice. It is used (1) of making out and allotting particular lands to veterans or others, e.g. in *lex Agraria* (Bruns, p. 69), *quod agri* IIIuir *dedit adsignauit;* D. VI. 1. l 15; &c.; (2) of assigning the several parts or articles of an estate to the several heirs, D. X. 2. l 22. § 1; and especially (3) of assigning the several freedmen to the several children who would then on the father's death become their patrons (D. XXXVIII. 4): of this it is said *adsignare quis potest quibuscumque uerbis uel nutu uel testamento uel codicillis uel uiuus* (ib. l 1. § 3); (4) of a husband appropriating to his wife certain slaves or articles for her use (D. XXXII. l 45—l 49); and in other like applications. With the present passage comp. D. XXXVII. 9. l 1. § 24 *Quod si nondum sit curator (uentris in possessionem missae) constitutus, Seruius aiebat res hereditarias heredem obsignare non debere, sed tantum pernumerare et mulieri adsignare.*

l **63.** This law refers to the case of a man granting the usufruct of an estate of which he is the owner at a time when the usufruct is lying out in another man. The actual exercise of the right so granted would come into play only on the loss of it by the present holder. That this is the meaning of the law is confirmed by Bas. *τὴν γὰρ χρῆσιν τοῦ ἀγροῦ μου, ἣν ἕτερος ἔχει, παραχωρεῖν ἄλλῳ δύναμαι.* And so the commentators, only that Stephanus also mentions as possible another explanation, viz. that an owner in establishing a usufruct is conveying what is not his, because the enjoyment is not with him a separate servitude (cf. D. VII. 6. l 5. pr.). But this explanation would make the law into a mere empty riddle and be inconsistent with its place in Paulus' treatise *de iure singulari* from which it is extracted. l 72 gives a similar rule respecting bequests of usufruct.

quod nostrum non est, &c.] This apparently contradicts D. L. 17. l 54 *nemo plus iuris ad alium transferre potest, quam ipse haberet.* No doubt that is the reason for the case being treated in Paulus' work *de iure singulari,* which Paulus defined thus, *ius singulare est quod contra rationem iuris propter aliquam utilitatem auctoritate constituentium introductum est* (D. I. 3. l 16). A similarly epigrammatic statement of an allied case is given by Ulpian in D. XLI. 1. l 46 *non est nouum ut qui dominium non habeat alii dominium praebeat: nam et creditor pignus uendendo causam dominii praestat, quam ipse non habuit.*

cedere] Paulus no doubt meant *in iure cedere* (Gai. II. 24; 30). Surrender in court and mancipation were old statutable actions, and such did not admit of limitations of time and condition (D. L. 17. l 77). Accordingly doubts were entertained (see above, p. 196) whether a usufruct could

be constituted by surrender in court to commence from a future time, and Paulus thought not (*Ex certo tempore legari possit: an in iure cedi uel adiudicari possit uariatur; uideamus ne non possit, quia nulla legis actio prodita est de futuro*, Vat. Fr. 49). In l 4 of this title a fragment from Paulus says *ususfructus uel praesens uel ex die dari potest.* Probably this has undergone alteration by Tribonian. See Glück IX. 194, who treats the case in our text as an example of such an establishment of a usufruct *ex die.* But unless we suppose Paulus to have altered his opinion, Paulus could not have so regarded it. I think the following view is in better harmony with the circumstances. The surrender in court takes effect at once. The usufruct is actually established in the person of the surrenderee with the consequence that it will perish if he die or suffer *capitis deminutio*, or do not use it. As however another has a prior right to the usufruct the surrenderee cannot actually exercise his newly acquired right. At first sight it seems strange to imagine that a surrender would take place in these circumstances. But a surrender was the only legal form at the time for the purpose and it did not require delivery to perfect it. It may well be that the illness of the surrenderor or his intended absence from the country or the anticipated speedy loss of usufruct by the present holder made immediate action desirable and inconvenience improbable. The surrenderor could guard himself by an agreement with the surrenderee, that no action should be brought for the enjoyment of the usufruct until the present holder lost it. A case in which the seller had not disclosed the fact of the usufruct being out in another is mentioned in D. XXI. 2. l 46. pr. In the case supposed here there is no concealment and there is no postponement of the legal effect of the surrender. Hence I take it the surrenderor would not be liable to the surrenderee for the want of immediate possession, nor would the *actus legitimus* be in itself subject to any limitation of time. For an instance of strict law being regarded while yet it is in effect modifiable by agreement, see note on l 15. § 7 *Proprietatis*, &c. (p. 124 foll.). Under Justinian usufructs could be established by mere contract, which could be adapted to any circumstances, and so the difficulties of the old law vanished.

l **64.** The fructuary can avoid the duty of repairing a house of which he has the usufruct given him by abandoning the usufruct altogether. But (l 65) he is still liable for repairs of damage caused by his own or his agent's action (cf. l 48. pr.). On the duty of repairs see l 7. § 2 (p. 61).

derelinquere] Similarly necessary heirs (so-called) might abandon the inheritance and thus cease to be liable to the creditors (D. XXIX. 2. l 57). But abandonment did not in other cases always secure freedom from the claims of creditors (D. XLVIII. 23. l 2).

in quibus casibus] 'that is to say, in those cases in which'. Mommsen suggests *scilicet* for *et.* A similar mode of expression occurs in D. XXVII. 6. l 11. § 4. Cf. XXXVII. 9. l 1. § 14. If the fructuary is bound to repair, he has it seems the option of abandoning the usufruct. In other cases he is

not bound to repair and may decline to do so without being under any necessity to give up his right.

post acceptum iudicium] 'after acceptance of trial'. In the formulary process the conclusion of the formal pleadings was the statement by the Praetor of the issue to be tried. This joinder of issue was denoted (see Keller *Litis Cont.* § 6) on the part of the plaintiff by *litem* (*iudicium, actionem*) *contestari;* on the part of the defendant by *iudicium accipere, suscipere, actionem accipere, excipere, suscipere, litem suscipere,* &c. But *litem contestari* is also used of the defendant (Cic. *Att.* XVI. 15. § 2; Fest. s. v. *contestari;* D. IV. 8. l 32. § 9); and *iudicium accipere* of the plaintiff (D. IX. 4. l 39. § 3; cf. XXI. 1. l 21. § 2).

absolui eum debere] That compliance with the plaintiff's demand entitled the defendant to acquittal even after issue was joined was affirmed by Sabinus and Cassius to apply in every suit, and this view was adopted by Justinian (*Inst.* IV. 12. § 2). The other school of jurists made some exceptions, but the defective condition of the MS. of Gaius prevents any certainty on this point (Gai. IV. 114). For the general doctrine see also Gai. III. 180; and Dig. XXXIX. 4. l 5; Keller *Civil-Proz.* § 67. In the present case the same result is to follow from the willingness of the usufructuary to abandon his usufruct.

l 65. **quod diligens pater familias...facit**] Comp. l 9. pr. *ut boni uiri arbitratu fruatur;* § 2 *usurum quasi bonum patremfamilias.* Two kinds or grades of care, and correspondingly of fault, were recognised by the Romans, and are mentioned in D. X. 2. l 24. § 16 *Non tantum dolum, sed et culpam in re hereditaria praestare debet coheres, quoniam cum coherede non contrahimus, sed incidimus in eum: non tamen diligentiam praestare debet, qualem diligens paterfamilias,...(sed) qualem in suis rebus.* Neglect of the latter would be *culpa leuis;* neglect of the former (*qualem diligens p.*) would be *culpa lata.* There is no practical distinction between *exacta diligentia, omnis diligentia, qualem diligentissimus paterfamilias,* and that in the text. (See e.g. Wächter *Pand.* § 87.) Our passages are discussed in Hasse *Culpa* § 89.

§ 1. The testator bequeaths the usufruct as it is: the heir has, without special words, no obligation except to put the legatee in possession. Cf. l 7. § 2.

l 66. For the Aquilian action against (*cum*) the usufructuary see l 13. § 2; l 15. § 3; for the analogous action given to the usufructuary l 17. § 3.

serui corrupti] See D. XI. 3. The action was granted by the Praetor against any one who maliciously harboured another's slave or persuaded him to any wrong act so as to make him worse. The penalty was double the amount of the damage (*quanti ea res erit,* cf. l 1) at the time of his being corrupted or harboured (l 5. § 4). The double penalty was exacted even when the defendant confessed: which was not the case in a proceeding on the Aquilian statute (l 5. § 2). The action was applicable to all cases of corrupting slaves *Si in seruo ego habeam usum fructum,*

tu proprietatem, si quidem a me sit deterior factus, poteris mecum experiri; si tu id feceris, ego agere utili actione possum: ad omnes enim corruptelas haec actio pertinet (l 9. § 1). If a slave was the offender, he might be surrendered *noxae* in lieu of damages (l 5. § 4).

iniuriarum] (*a*) A right of action for outrage was given by the XII tables. Broken limbs and blows were punished with fines; libel with death. The Praetors developed the action and modified the penalty, leaving it to the judge to fix (Gell. XX. 1. § 12 sqq.; 31 sqq.). Outrage included all acts of purposed insult to the person either of oneself or of those under one's power, or to one's personal dignity or reputation. Blows, forcible entry into one's house, attempts at seduction, indecent address to women, withdrawal of their attendants, pelting with mud, libel, public abuse, attacks on reputation by treating a man as a debtor who is not so, or advertising his goods for sale, wrongfully putting a slave to the torture with a view to insult his master, and many other acts gave this right of action (Gai. IV. 220—225; Paul. *Sent.* V. 4; D. XLVII. 10; cf. Keller *Inst.* § 162). The right remained even if the owner had parted with the slave or set him free (D. L. 3. l 29). The damages were assessed by the injured party, subject to reduction by the judges (Gai. III. 224).

(*b*) The statement in the text however appears to be in conflict with D. XLVII. 10. l 15. § 37, where in commenting on the edict *Qui seruum alienum aduersus bonos mores uerberauisse, deue eo iniussu domini quaestionem habuisse, dicetur, in eum iudicium dabo* Ulpian says *Nec si fructuarius id fecerit* [i.e. *uerberauerit*], *dominus cum eo agit, uel si proprietarius fecerit, fructuarius eum conueniet.* No doubt strictly these words only relate to *uerberare*, but the context does not apparently justify any distinction in this point of view between beating and putting to question with torture, Probably Paulus is referring to excessive torture, or torture without reasonable ground (cf. D. XLVII. 10. l 15. § 42), and Ulpian is denying the responsibility of fructuary to owner or of owner to fructuary for beating (or torturing) a slave in circumstances which justify an owner or quasi-owner, and do not justify a third person. Indeed it would be unlikely that a fructuary should injure the slave, of which he had the use, with the intention of thereby insulting the owner.

(*c*) Several actions being thus open to the injured party, the question arose whether he might use one only or all. Some held that the plaintiff had to elect which he should take, and the right to bring the others thus dropped (*altera electa alteram consumi*). Paulus says (or is made to say in the Digest XLIV. 7. l 34. pr.), that it was eventually held that he might bring which action he pleased without thereby forfeiting his right to bring another, but the damages in the second action would be cut down to so much only as exceeded what he recovered in the first action (ib. l 32; l 34; l 41; l 53). This applied when it was the same deed which formed the subject of all the actions. Repeated acts subjected the offender to repeated suits. In the three kinds of actions mentioned here there

was a different basis for assessment of damages for each: in the action on the Aquilian statute it was the greatest value of the slave in himself and what would have accrued to him during the preceding twelve months; in the action for corrupting the slave, it was double the actual deterioration, bodily or mental, of the slave at the time of the act; in the action for insult it might evidently be aggravated by circumstances which were independent of the positive damage, but concerned the honour and reputation of the plaintiff or his family.

l 67. Any usufruct can be sold (l 12. § 2), and the heir has no more right to control the sale or have a veto on the purchaser than has any other bare proprietor. Here however the point seems to be whether a usufruct bequeathed can be sold to a stranger; whether, in fact, it should not be regarded as simply a temporary provision for a member of the family.

extraneo] i.e. a stranger to the family of the testator. The meaning of *extraneus* 'an outsider' depends on the context. Thus e.g. it is used of one who is not *ex numero liberorum* (D. L. 12. l 14); so *extraneus heres siue ex suis* (D. XXIX. 5. l 6. § 1); opposed to *qui in potestate est* (D. XLVIII. 10. l 10; and l 46 above); of one who does not owe a freedman's duty to a patron (D. XXXVII. 15. l 8); of one who has no rights in an estate, *si arbores in fundo, cuius usus fructus ad Titium pertinet, ab extraneo uel a proprietario succisae fuerint* (D. XLIII. 24. l 13); of one who is bound by no confidential relation, and therefore is free to contract a purchase (D. XVII. 1. l 59. § 1), or loan (D. XXVI. 7. l 54); &c.

l 68. **uetus fuit quaestio**] Cicero refers to this in *Fin.* I. 4. § 12 *An, partus ancillae sitne in fructu habendus, disseretur inter principes ciuitatis P. Scaeuolam M'.que Manlium ab iisque M. Brutus dissentiet, haec quae uitam continent negligentur?* At the time of the lawyers of the Digest the point was settled in favour of the opinion of Brutus. *Partus ancillae* was not regarded as *in fructu.* It was not produce which the fructuary or husband or *bona fide possessor* could claim as his own; D. XXII. 1. l 28 (Gaius) *In pecudum fructu etiam fetus est, sicut lac et pilus et lana: itaque agni et haedi et vituli statim pleno iure sunt bonae fidei possessoris et fructuarii. Partus uero ancillae in fructu non est; itaque ad dominum proprietatis pertinet;* XXIII. 3. l 10. §§ 3, 4 *Si serui subolem ediderunt, mariti lucrum non est* (otherwise, if the dowry was valued to the husband; ib. l 18). *Sed fetus dotalium pecorum ad maritum pertinent, quia fructibus computantur;* ib. l 69. § 9; XXXVI. 1. l 23 (22). § 3 (Ulp.) *praeterea (reddentur) si qui partus extant et partuum partus, quia in fructibus hi non habentur;* XLVII. 2. l 48. § 6 *Ex furtiuis equis nati statim ad bonae fidei emptorem pertinebunt; merito, quia in fructu numerantur: at partus ancillae non numeratur in fructu;* Paul. *Sent.* III. 6. § 19. But the matter was not so obvious but what a man might, if he had the usufruct of a female slave, honestly alienate the offspring without being charged with theft (D. XLI. 3. l 36. § 1, and Gai. *Inst.* II. 50). The

produce belonged to the owner of the slave, and consequently went with the slave or with the estate of which it was part (D. IV. 2. l 12; V. 3. l 27. pr.; VI. 1. l 17. § 1; XXIV. 3. l 31. § 4; XXXV. 2. l 30. pr.; XLII. 8. l 10. § 21). When a woman slave was the subject of, or was included in, a bequest, whether direct or by way of trust, any offspring, born after the heir was chargeable with delay, had to be given up along with the mother (D. XXII. 1. l 14. pr.; XXX. l 91. § 7), but whether offspring born before the vesting of the bequest could be retained by the heir, or must be given up to the legatee, was decided differently by the lawyers. Papinian held that they must be given up (XXXVI. 1. l 60. (58.) § 4; cf. XXXIII. 7. l 3. pr.), and Ulpian apparently took the same view (XXXVI. 1. l 23. (22.) § 3). Neratius Priscus and Paulus held that the heir could claim them (XXII. 1. l 14. § 1; XXXV. 2. l 24. § 1), and Scaevola decided two cases in the same sense, though perhaps the decision was influenced by the precise wording of the will (XXXII. l 41. § 10; XXXIII. 5. l 21). Both Papinian and Paulus agree in not reckoning *partus ancillarum* as coming in such cases under the term *reditus*. See Cujac. *in lib.* IX. *respons. Papin.* (IV. p. 2441, ed. 1837). The reconciliation suggested by Donell. *Jur. Civ.* VII. 26. § 8 (II. p. 668, ed. 1841) is quite arbitrary.

partus] sc. *ancillarum*. Probably Ulpian had been treating of usufruct in slaves just before. The two last fragments from this 17th book *ad Sabinum* (l 21, l 23) are concerned with that. Moreover *partus*, though in lay writers applied to animals as well as to children, seems almost restricted to the offspring of women in the law writers. At least Dirksen and Heumann contain no passage in which *partus* is used of animals except D. V. 3. l 25. § 20 *augent hereditatem gregum et pecorum partus*, and XXIV. 3. l 7. § 9 where *prope partum* is used for 'near lambing', but *fetus pecorum* for the lambs, &c.

sententia optinuit] Brutus' opinion prevailed. For this use of *obtineo* cf. Liv. XXI. 46 fin. *quod et plures tradidere auctores et fama obtinuit;* Sall. *ad Caes.* I. 1; Dig. I. 16. l 7. pr. *Debet feriis secundum mores et consuetudinem, quae retro optinuit, dare;* XXX. l 127; *optinuit Galli sententia alienos quoque postumos legitimos nobis heredes fieri*, &c.

fructuarium, &c.] Mommsen suggests that *ius* should be inserted after *optinuit;* why, I do not know; apparently he means it to be taken with *fructuarium*. But the fructuary, just as well as the right of the fructuary, may be said to have no place in regard to the offspring, if he cannot claim it.

neque enim in fructu, &c.] This is not given as the reason urged by Brutus, but apparently as Ulpian's own. In D. V. 3. l 27. pr. he gives another, *quia non temere ancillae eius rei causa comparantur ut pariant.* Gaius (followed by Justinian *Inst.* II. 1. § 37) gives another, *absurdum uidebatur hominem in fructu esse, cum omnes fructus rerum natura hominum gratia comparauerit* (D. XXII. 1. l 28. § 1). This last view is founded on the doctrine of Aristot. *Polit.* I. 8 *οἰητέον τά τε φυτὰ τῶν ζῴων ἕνεκεν εἶναι καὶ*

τὰ ἄλλα ζῷα τῶν ἀνθρώπων χάριν, and εἰ οὖν ἡ φύσις μηδὲν μήτε ἀτελὲς ποιεῖ μήτε μάτην, ἀναγκαῖον τῶν ἀνθρώπων ἕνεκεν αὐτὰ πάντα πεποιηκέναι τὴν φύσιν, and attributed to the Stoics by Lucret. II. 174 *genus...humanum quorum omnia causa constituisse deos fingunt ;* ib. v. 157 ; Cic. *Legg.* I. 8. § 25 *Itaque ad hominum commoditates et usus tantam rerum ubertatem natura largita est ;* so that not only plants but animals are produced for man's use. (More in Schrader *ad Inst.* l. c.) Schrader also refers to the language of Paulus (D. XXI. 1. l 44. pr.) *Iustissime aediles noluerunt hominem ei rei quae minoris esset accedere...ut ait Pedius, propter dignitatem hominis...ceterum hominis uenditioni quiduis adicere licet.* Böcking understands and approves the reason given in our passage as resting on the principle that a slave gained for the fructuary only *ex re fructuarii* or *ex operis suis,* and the offspring coming under neither head consequently falls to the owner. But the limitation of the principle itself requires explanation. Why is a lamb the property of the fructuary and a child not? I think the natural explanation is that, wars being frequent and the slave trade perfectly open, the Romans looked rather to getting their slaves ready grown, and not to breeding them. And when they did breed them, it was apparently for their own use on the estate, and not for sale. (Cf. Varr. *R. R.* II. 10 ; ib. 1 ; Colum. I. 8. § 19, &c.) If the child of a slave-woman was to be taken as his own by one who like a fructuary or *bona fide possessor* had only a life interest or temporary connexion, it meant separation from the slave's family and from the estate. It would be a breach of the domestic character of the institution, and thus not suited to the character of usufruct as a temporary provision for the member of a family, and unnecessarily favourable to a mere intruder like a *bona fide possessor.* And no doubt there was a natural willingness on the part of the lawyers to recognise a distinction between a boy or girl on the one hand, and on the other hand a foal, or calf, or lamb, or puppy, which he might kill or even consume at pleasure. A slave was legally a thing, a chattel, but he was *de facto* a person, with a possibility, frequently realised before their eyes, of becoming legally a person. The law was full of regulations and principles derived from this mixed character so that an anomaly is to be expected.

hac ratione nec usum fructum, &c.] 'on this principle the fructuary will not have a usufruct any more than he has a property in the child'. A fructuary could use what he found, and vegetable fruits he could gather and consume (l 27. pr.). Any produce coming into being afterwards he could as a rule take also as his own, whether the young of animals, the fruits of trees and other vegetable crops, or the produce of mines and quarries. Gradual increments such as the growth of trees, alluvial deposits, the increased strength, capabilities and value of the estate or thing or creatures, he could use and employ. But a child born after his usufruct commenced was under none of these classes. The law said he was not a *fructus,* and yet he was a separate and individual thing. So it was held, as in the case of an island rising in the river and adjacent

to an estate, that it belonged indeed to the owner of the estate or the mother, but was not subject to the usufruct. But express words would of course give the fructuary a usufruct in the *partus* as well as in the *ancilla*. Maians. *ad* XXX *Iuriscons.* I. 130 takes wrongly *in eo* to mean *in homine*, not *in partu*.

cum possit partus legari] There is nothing to prevent a bequest of (the ownership of) a slave's (future) offspring being valid, and hence there was no objection to a bequest of the usufruct of a slave's (future) offspring. The only objection to the former that appears possible is that the offspring was future and uncertain. This was an objection before the Sc. Neronianum to a legacy *per uindicationem*, but not to a legacy *per damnationem*. Cf. Gai. III. 203 *ea quoque res quae in rerum natura non est, si modo futura est (=esse potest?), per damnationem legari potest, uelut 'fructus qui in illo fundo nati erunt', aut 'quod ex illa ancilla natum erit'*; D. XXX. l 24. pr.; l 63; XXXI. l 73; XXXV. 1. l 1. § 3.

§ 1. **fetus tamen pecorum**, &c.] See D. XXII. 1. l 28 quoted above (p. 240 *uetus fuit quaestio*). *Fetus pecorum* is frequently named besides, and thus opposed to *partus ancillarum*, &c. D. IV. 2. l 12. pr.; XX. 1. l 15. pr.; XXIII. 3. l 10. § 2, § 3, § 18; XXXVI. 1. l 60 (58) § 4; XLI. 3. l 4. § 5; Paul. *Sent.* II. 17. § 7 (cf. ib. 5. § 2 *fetus uel partus eius rei quae pignori data est*): III. 6. § 20; Cod. V. 13. § 9; and *fetus* is in other places applied to animals, e.g. XXII. 1. l 39; XLI. 1. l 48. § 2. On the indiscriminate use of *pecud-* and *pecor-* see above on l 3. § 1 *iumentis*, p. 39.

§ 2. **gregis uel armenti**] Cf. l 70. § 3 *gregis uel armenti uel equitii*; D. VI. 1. l 1. § 3 *Posse gregem uindicari Pomponius scribit. Idem et de armento et de equitio ceterisque quae gregatim habentur dicendum est. Grex* is itself quite general. Varro uses it of sheep (*R. R.* II. 1. § 16), goats (ib. 3. § 1), pigs (4. § 3), oxen (5. § 5), asses (6. § 2), horses (7. § 1), mules (8. § 6), peacocks (III. 6. § 1), geese (10. § 1), ducks (11. § 1); and in the Digest it is applied to oxen (XXX. l 22) and to horses (XLVII. 14. l 1. § 1), though sometimes distinguished from them as above.

Armentum properly 'plough-beast' is generally used of the larger cattle, especially of oxen, in herds, e.g. *Qui gregem armentorum emere uult* (Varr. *R. R.* II. 5. § 7) and opposed to the tame oxen (ib. 1. § 4). Vergil after speaking of oxen and horses says (*G.* III. 286) *hoc satis armentis: superat pars altera curae, lanigeros agitare greges hirtasque capellas.* He also uses it of deer (*Aen.* I. 185). Pomponius (Dig. L. 16. l 89) says *Boues magis armentorum quam iumentorum generis appellantur*, and Modestinus (D. XXXII. l 81. §§ 2—5) *Pecudibus legatis et boues et cetera iumenta continentur, armento autem legato etiam boues* (Mommsen suggests *et iumenta et boues*) *contineri conuenit, non etiam greges ouium et caprarum. Ouibus legatis neque agnos neque arietes contineri quidam recte existimant; ouium uero grege legato et arietes et agnos deberi nemo dubitat.*

adgnatis] 'those born to the flock', i.e. subsequent to its formation. Cf. D. XXXIII. 7. l 28 *Quaesitum est fundus instructus quemadmodum dari*

debeat, utrum sic ut instructus fuit mortis patrisfamiliue tempore, ut, quae medio tempore adgnata aut in fundum illata sunt, heredis sint; XLVII. 4. l 1. § 11 *partus uel fetus post mortem (testatoris) adgnatos;* ib. 2. l 14. § 15 *non solum in re commodata competit ei cui commodata est furti actio, sed etiam in ea quae ex ea adgnata est;* XXVIII. 3. l 3. § 1 *Postumi per uirilem sexum descendentes ad similitudinem filiorum nominatim exheredandi sunt, ne testamentum adgnascendo rumpant;* Cic. *Or.* I. 57. § 241 *Constat adgnascendo rumpi testamentum.* Hence the *agnati*, i.e. members of the family connected through males (Gai. III. 10), were originally those born to a *paterfamilias* and coming thereby under his power. The term was afterwards applied to the connexion of those persons *inter se*, who, if the common ancestor were alive, would be part of his family.

gregem supplere] 'to fill up the flock'. Cf. Paul. *Sent.* III. 6. § 20 *Gregis usufructu legato, integro manente fetus ad usufructuarium pertinent, saluo eo ut quidquid gregi deperierit ex fetibus impleatur. Supplere* is used also below, l 70. pr. and § 1. D. XXIII. 3. l 10. § 3 *Fetus dotalium pecorum ad maritum pertinent...sic tamen ut suppleri proprietatem prius oporteat, et summissis in locum mortuorum capitum ex adgnatis residuum in fructum maritus habeat;* XXXVI. 1. l 46. § 1.

capitum] 'heads' of single persons, e.g. Gai. III. 8 *non in capita sed stirpes hereditatem diuidi;* of slaves XXI. 2. l 72; ib. 1. l 34. § 1; of animals D. VI. 1. l 1. § 3; l 2; l 3; &c.

l 69. **summittere**] 'to let grow', 'rear'. Cf. l 70 several times; XXIII. 3. l 10. § 3; XXXVI. 1. l 60. (58.) § 4. This use of the verb arises from the primitive meaning 'to send' or 'let go' up; Lucr. I. 8 *Tibi suauis daedala tellus summittit flores;* ib. 193 *Huc accedit uti sine certis imbribus anni laetificos nequeat fetus submittere tellus;* Lucan IV. 411 *Non pabula tellus pascendis submittit equis.* Either in this or the derivative sense the word is used in Hor. *Od.* IV. 4. 63 *Non Hydra secto corpore firmior creuit, monstrumue submisere Colchi maius; Sat.* II. 4. 63. As growth is usually upwards, the word is frequently and almost technically used of 'letting things grow', e.g. Cato *R. R.* 8. § 1 *Pratum si inrigiuum erit, si non erit siccum, ne faenum desiet, summittito* ('leave it for grass'); Varr. *R. R.* I. 49. § 1 *De pratis summissis, herba cum crescere desiit et aestu arescit, subsecari falcibus debet;* Col. XI. 2. § 27; 3. § 36 *Id cum semel seueris, si non totum radicitus tollas sed alternos frutices in semen submittas, aeuo manet;* ib. V. 5. § 17; *Arb.* 5. § 1 *Tum demum uineam pampinato et duas materias relinquito, alteram quam uitis constituendae causa submittas, alteram subsidio habeas* (i.e. one shoot to make the future vine, another as a reserve in case the first does not come on well); ib. § 2; &c. Hence of the hair of the head, Plin. *Ep.* VII. 27. § 14 *Reis moris est summittere capillum;* D. XLVII. 10. l 15. § 27 *si barbam demittat uel capillos submittat;* ib. l 39; Sen. *Polyb.* 17. § 36 *modo barbam capillumque summittens.* Hence of rearing animals instead of sending them to the butcher; Varr. *R. R.* II. 2. § 18 *Castrare oportet agnum non minorem quinque mensium:*

quos arietes submittere uolunt, potissimum eligunt ex matribus quae geminos parere solent; ib. 3. § 8 *In nutricatu haedi trimestres cum sunt facti, tum submittuntur et in grege incipiunt esse;* Colum. VII. 3. § 13 *Post faeturam deinde longinquae regionis opilio fere omnem sobolem pastioni reseruat: suburbanae uillicus enim teneros agnos, dum adhuc herbae sunt expertes, lanio tradit...submitti tamen etiam in uicinia urbis quintum quemque oportebit ...nec committi debet, ut totus grex effetus senectute dominum destituat: cum praesertim boni pastoris uel prima cura sit annis omnibus in demortuarum uitiosarumque ouium locum itidem uel etiam plura capita substituere:* III. 6. § 2; 10. § 17; ib. VII. 9. § 4 (of swine) *Hoc autem fit in longinquis regionibus, ubi nihil nisi submittere expedit: nam suburbanis lactens porcus aere mutandus est:* ib. § 6; Verg. *G.* III. 73 of horses *quos in spem statues summittere gentis;* ib. 159 *quos aut pecori malint summittere habendo aut aris seruare sacros;* *B.* I. 45 *Pascite ut ante boues, pueri; summittite tauros* ('rear the bulls', i.e. do not sell them off as if your herds would no longer be safe).

post substituta ea fiant priora fructuarii] I have inserted *ea: priora* (for *propria*) is Janus a Costa's conjecture approved by Mommsen. My reading is I think quite in accord with that of Stephanus who writes: [ὥs]τε μετὰ τ[ὴν αὐτῶν] ὑποβολ[ὴν] αὐτὰ τὰ ἄχρεια τῆς τοῦ οὐσουφρουκτουαρίου γενή[σε]ται δεσποτείας. Mommsen suggests *pro substitutis* for *post substituta*. My reading is simpler and accords better with the Greek. The text of the MSS. can hardly be sound: we should have to supply a subject from *defunctorum uel inutilium*, so that 'after the substitution has been made they (viz. the dead or useless cattle) become the property of the fructuary'. *Post substituta ea* is in construction similar to *post acceptum iudicium*, &c. Cf. *Lat. Gr.* § 1407.

lucro cedat domino] 'should fall to the profit of the owner'. Cf. Gai. IV. 30 *Sponsionis et restipulationis poena lucro cedit aduersario qui uicerit;* Paul. *Sent.* II. 22. § 1 *Fructus fundi dotalis constante matrimonio percepti lucro mariti cedunt;* D. VI. 1. l 35. § 1 *non debere lucro possessoris cedere fructus, cum uictus sit;* XXXI. l 17 *Si quis Titio decem legauerit et rogauerit ut ea restituat Maeuio Maeuiusque fuerit mortuus, Titii commodo cedit, non heredis.* The double dative in the text and in Gaius is like those in *Lat. Gr.* § 1163. For the use of *cedere*, cf. *solo cedere* Dig. XLI. 1. l 9. pr.; *chartis cedere* ib. § 1; *arbor agro cedit* ib. l 26. § 1; &c.

substituta statim domini fiunt] The young animals are at first the property of the fructuary, but, on being substituted for the old members of the herd, become at once the property of the owner of the herd, and that without any action or even knowledge on his part. The change of ownership ensues on incorporation with the herd, just as the materials owned by a contractor become by incorporation in a building the property of the owner of the soil (D. VI. 1. l 39. pr.). For *statim*, cf. D. XLVII. 2. l 48. § 6 *Ex furtiuis equis nati statim ad bonae fidei emptorem pertinebunt.*

priora quoque ex natura fructus, &c.] 'the former heads', i.e. the

old or useless animals, 'on the substitution of others for them, become the property of the fructuary'. The exact reference of *quoque* is not quite clear. It might be taken to refer to the second and corresponding case of sudden change of ownership without delivery. But it is possible also to connect it with *ex natura fructus*. It was as fruits that the young animals became the property of the usufructuary: and under the same character of fruits the old animals, now as it were pushed off by the younger, cease to be the proprietor's and become the fructuary's.

nam alioquin] For in other cases we find things, when first born, becoming the property of the fructuary, and afterwards when substituted for other produce, ceasing to be his. The reference is apparently to the case of trees mentioned above in l 18. The act of gathering or appropriating by virtue of the position of the fructuary, requires no act of delivery by the proprietor; and the substitution of the new plants or young animals for the old ones is an act of delivery on the part of the fructuary.

l 70. pr. **si non faciat nec suppleat**] Krüger and Mommsen suggest the omission of *nec suppleat*. But the words may be retained if we consider *faciat* equivalent to *summittat* and thus representing an earlier stage in the proceeding to that expressed by *suppleat*. But as Ulpian's sentence at the end of l. 68 is broken off, we cannot tell what may have intervened in Ulpian between l. 68 and l. 70.

teneri] 'that he is liable' in an action on the case. Godefroi compares the somewhat analogous cases given in D. XIX. 5. l 10; l 12.

§ 1. **quamdiu summittantur**] 'whilst the young are being let grow and the heads which have died are being replaced'. *Quamdiu* sometimes means 'until' (cf. D. VII. 4. l 15), and that meaning would suit with *suppleantur*. The omission of the subject to *summittantur* is awkward. Perhaps the impersonal *summittatur* was the real reading. *Supplere* was used above in l 68 in the sense of 'fill up', and so probably at the beginning of this law. Here by an easy transition it means 'replace'. The question raised is this. Some members of the herd die: there is at the time no young animal old enough to put into the herd, but there are some young which, some or all, may in time be fit, but may also die previously or be killed or sold. Whose property are these young? The answer is, till they have grown up and are placed in the herd, they belong whether alive or dead (l 69; l 7. § 2) to the fructuary, and are at his risk. If and when they are so placed, they belong to the herd-owner. Julian however treats this as a case of property in suspense, and, if this be so, the property is not decided until some act on the fructuary's part, e.g. sending the lamb to the butcher, or putting it in the herd, fixes the animal's lot. Meantime if the animal is stolen, neither fructuary nor owner can bring a *condictio furtiua* (l 12. § 5), and, if the animal is slain and eaten, is the thief to be always unpunished because the decisive act cannot now be taken? If the usufruct come to an end, while there are still young animals in this proba-

tionary state, who is to claim them? I presume the fructuary's heir would, because they have not yet been incorporated into the herd. (But cf. l 25. § 1.) And in the same way if they are stolen, the fructuary could bring the *condictio* because they have not yet been incorporated. I doubt whether Julian, whose view is approved by Ulpian, really meant that the property was for the time ownerless, absolutely *in pendenti*, and not that it was not finally decided. It is better to interpret his words in a sense quite suitable to the notion of *pendens dominium*, but suitable also to the practical necessities of the position. *Pendens* is properly applied to property vested in an owner for the time, though it may be liable on the occurrence of an event to be divested in favour of another. This view makes Julian's statement consistent with Pomponius in l 69 and with l 70. § 2. Wächter (*Pand.* I. § 69, p. 344) holds that in this single case of animals born when the herd is not full, there is still (in Germany) such a thing as property in suspense, but that all other alleged cases have become unpractical, and that even in this the practice of German courts does not recognise it. Vangerow *Pand.* § 301 also allows it (as well as some others).

§ 2. **carnem fetus**, &c.] The young when alive was the property of the fructuary, not merely the object of a usufruct: it was his as produce of the herd: hence the carcase belongs to him also. In D. VII. 4. l 30 we have a different case, *caro et corium mortui pecoris in fructu non est, quia mortuo eo ususfructus extinguitur*, i.e. a usufruct in a herd of cattle does not carry with it a right to the carcase. The fructuary has no power of consumption of the objects of his usufruct.

§ 3. **gregis uel armenti uel equitii**] *Grex* is a general term; *armentum* applies to plough beasts; *equitium* is a stud of horses: cf. l 68. § 2.

uniuersitatis] 'of the whole' or 'collective unity'. The commonest instances of such wholes are a flock, as here, cf. D. XXX. l 22; a house (D. XLI. 1. l 7. § 11), an inheritance (Gai. II. 97 sqq.). On the different kinds of *corpora* (or *uniuersitates*) see D. XLI. 3. l 30. pr.

nihil supplebit] i.e. he will not be bound to supply anything. If an individual animal or thing is left him in usufruct, the fructuary can use it in a proper way, and, if it die, he loses his usufruct but is in no way bound to replace it. If a herd is left him, he has to keep the herd in good condition and thus to keep up its numbers out of its own produce. But if some pestilence were to destroy the herd, the fructuary would not be bound to purchase others to keep up the herd. His only obligation is to deal with the herd as a good man of business, and not to take of its fruits, i.e. the young, so thoughtlessly or greedily as to prevent or endanger the continuance of the herd.

§ 4. The case put in this section is this: The herd is full in number, and young are born: there is no obligation resting on the fructuary, and the young are his property. Some vacancies occur in the herd. Does the occurrence of these vacancies put a present obligation on the fructuary, so that he ought at once to put some of the young definitely into the herd;

or may the fructuary still deal with these as he likes, and supply the vacancies only out of subsequent births? Ulpian answers apparently that the duty of supplying the vacancies arises when the vacancies occur, but that this does not affect the right of property already acquired by the fructuary in the former produce. Eventually if the vacancies be not supplied, he will be liable in damages. But presumably he is not bound always to supply the vacancies, however unexpected, at once, nor consequently is he bound to have a stock ready for the purpose larger than the average deficiencies which may be expected. The obligation with this class of property, as with all, is to act as a *bonus paterfamilias*, i.e. as a prudent man of business.

est] So the inferior MSS., and the reading is approved by Mommsen. The Florentine has *et:* but *est* forms a better antithesis to *nihil fuit.*

nocere debere] is a vague phrase, meaning apparently that the fructuary is liable.

§ 5. **summittere facti est**] 'what is rearing is a question of fact' (not of intention, cf. D. XXIX. 2. l 20. pr. &c.), i.e. the judge has nothing to do with mere intention. He has to ascertain from the actual dealing with the herd whether certain head of cattle have or have not been *summissa.* Julian says that rearing implies a separation of some kind—apparently so as to show that this or that animal is destined not for the butcher, but for keeping up the stock, and consequently is no longer the property of the fructuary, but of the proprietary. What distinction is intended between *dispertire, diuidere* and *diuisionem facere* I cannot tell. Probably a variety of expressions were used by Julian to show that there was no specific mode of separation required, but only a separation of some kind which showed the farmer's purpose actually carried into effect.

quo] So Mommsen suggests. The MSS. have *quod*, which is ambiguous and not so appropriate as *quo;* 'by which act of division the property in the animals let grow will come to the proprietor'.

l 71. Change in the specific form of a thing caused the extinction of the usufruct (*Rei mutatione interire usumfructum placet* D. VII. 4. l 5. § 2). But this is absolutely true, only if the change was really the destruction of the thing. The usufruct of a house is gone if the house is pulled down; and even the rebuilding of the house in the same form would not revive the usufruct (ib. l 10. § 1; Paul. *Sent.* III. 6. § 31). The usufruct of cups is gone, if the cups are melted into a mass of metal: and cups remade from the same metal will not be subject to the old usufruct (above l 36. pr.). But a vacant piece of ground is no longer vacant indeed, if a house is built on it, and therefore the usufruct is lost; but if the house is pulled down and the ground again becomes vacant, it is the same ground vacant, and the usufruct revives (cf. D. VII. 4. l 23; l 24). But a usufruct may perish by non-user; and therefore if the building continued long enough for the non-user of the vacant ground to become fatal, the usufruct is dead and will not revive on the subsequent removal of the building. Of course the

usufructuary will have his remedy according to circumstances by an action against the person who by building has thus frustrated his enjoyment of the usufruct (D. VII. 4. 1 5. § 3—1 7). The proprietor indeed may obviate this action by granting the usufruct anew (ib. 1 7).

superficie] The superficies ('what is above the face of the land') was the building as distinguished from the site. Cf. Cic. *Att.* IV. 1. § 7 *De domo nostra nihil adhuc pontifices responderunt: qui si sustulerint religionem, aream praeclaram habebimus, superficiem consules ex senatus consulto aestimabunt;* ib. 2. § 5 *nobis superficiem aedium consules de consilii sententia aestimarunt sestertio uicies;* Colum. I. 5. § 9; Javol. D. XLI. 3. 1 23. pr. *aedes ex duabus rebus constant, ex solo et superficie;* Gai. II. 73 *Id quod in solo nostro ab aliquo aedificatum est, quamuis ille suo nomine aedificauerit, iure naturali nostrum fit, quia superficies solo cedit.*

1 72. **accesserit**] sc. *ususfructus proprietati.*

plus admittit Maec.] Ulpian leaves this point undecided. Bas. adopts Maecianus' view, which must have been approved by Justinian, who allowed its expression without note of disapproval.

utiliter diem cedere] 'that it is validly vested'. For this use of *utiliter* cf. D. XXVIII. 5. 1 49. (48.) § 2 *interdum nec cum libertate utiliter seruus a domina heres instituitur;* ib. 1 90 (89); XXXVII. 11. 1 6. On *diem cedere* see above on 1 27. pr. p. 178. 'The usufruct would not vest in the legatee until its present holder lost it. If, when that happened, the legatee was not alive, it would be merged in the propriety'.

pertinere] sc. *usumfructum.*

1 73. Covering the area with building or putting a regular house on it would be a change of the area and forfeit the usufruct, or at least make the usufructuary liable to the proprietor. Paul. *Sent.* III. 6. § 21 *areae usufructu legato aedificia in ea constitui non possunt.* But the text sanctions the mere erection of a hut or cottage for the better guard of the property on the area. A similarly slight erection (*casa*) was allowed on a public beach (D. I. 8. 1 5. § 1).

posse] We must understand *puto*, or *dicendum est* or the like. The compilers have cut away the governing word.

1 74. Each slave acquires for his master; and when two persons are legatees in common, if no shares are specified, they take equally.

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